

IN THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

RICHARDS ENOS; et al.,
Plaintiffs - Appellants,

vs.

ERIC HOLDER; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EXCERPT OF RECORD

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RICHARD ENOS, JEFF BASTASINI,
LOUIE MERCADO, WALTER
GROVES, MANUEL MONTEIRO,
EDWARD ERIKSON and VERNON
NEWMAN,

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Plaintiffs,

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vs.

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ERIC HOLDER, as United States
Attorney General, and ROBERT
MUELLER, III, as Director of the
Federal Bureau of Investigation, and
UNITED STATES OF AMERICA,

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Defendants.

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CASE NO.: 2:10-CV-02911-JAM-EFB

NOTICE OF APPEAL TO THE
UNITED STATES DISTRICT COURT
OF APPEAL FOR THE NINTH
CIRCUIT

Plaintiffs: RICHARD ENOS, JEFF BASTASINI, LOUIE MERCADO,
WALTER GROVES, MANUEL MONTEIRO, EDWARD ERIKSON and VERNON
NEWMAN, appeal to the United States Court of Appeal for the Ninth Circuit from
the final judgment of the district court, entered in this case on February 28, 2012,
and all interlocutory orders that gave rise to the judgment, including but not
limited to the ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, filed

1 on February 28, 2012. (Dkt # 63) and the ORDER GRANTING IN PART AND
2 DENYING IN PART DEFENDANTS' MOTION TO DISMISS filed on July 8, 2011.
3 (Dkt # 24).

4 Dated: February 29, 2012

5 /s/ Donald Kilmer

6 Donald Kilmer, Attorney for Plaintiffs

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RICHARD ENOS, JEFF BASTASINI,
LOUIE MERCADO, WALTER
GROVES, MANUEL MONTEIRO,
EDWARD ERIKSON and VERNON
NEWMAN,

11 Plaintiffs,

12 vs.

13 ERIC HOLDER, as United States
14 Attorney General, and ROBERT
15 MUELLER, III, as Director of the
16 Federal Bureau of Investigation, and
17 UNITED STATES OF AMERICA,

18 Defendants.

19

20 The undersigned represents Plaintiff/Appellants: RICHARD ENOS, JEFF
21 BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO,
22 EDWARD ERIKSON and VERNON NEWMAN, in this matter and no others.

23 The remaining parties to this action are the Defendant/Appellees: ERIC
24 HOLDER, as United States Attorney General, and ROBERT MUELLER, III, as
25 Director of the Federal Bureau of Investigation, and UNITED STATES OF
26 AMERICA.

27 Plaintiff/Appellants
28 Representation Statement

Page 1 of 2

Enos v. Holder

1 Plaintiff/Appellants are currently represented by:

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13 Dated: February 29, 2012

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO

RICHARD ENOS, JEFF BASTASINI,
LOUIE MERCADO, WALTER
GROVES, MANUEL MONTEIRO,
EDWARD ERIKSON and VERNON
NEWMAN,

Plaintiffs,

vs.

ERIC HOLDER, as United States
Attorney General, and ROBERT
MUELLER, III, as Director of the
Federal Bureau of Investigation, and
UNITED STATES OF AMERICA,

Defendants.

CASE NO.: 2:10-CV-02911-JAM-EFB

Certificate of Service:

NOTICE OF APPEAL TO THE
UNITED STATES DISTRICT COURT
OF APPEAL FOR THE NINTH
CIRCUIT

And:

REPRESENTATION STATEMENT

This is to certify that on February 29, 2012, a true and correct copy of the NOTICE OF APPEAL TO THE UNITED STATES DISTRICT COURT OF APPEAL FOR THE NINTH CIRCUIT, and the REPRESENTATION STATEMENT, were filed electronically with this court, thus giving all parties and their attorneys notice and copies of said documents via the Court's CM/ECF system and/or the PACER system.

/s/ Donald Kilmer, Counsel for Plaintiff/Appellants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

RICHARD ENOS, ET AL.,

CASE NO: **2:10-CV-02911-JAM -EFB**

v.

ERIC HOLDER, ET AL.,

XX --- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 2/28/2012**

Victoria C. Minor
Clerk of Court

ENTERED: **February 28, 2012**

by: /s/ L. Reader

Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD ENOS, JEFF BASTASINI,) Case No. 2:10-CV-2911 JAM-EFB
LOUIE MERCADO, WALTER GROVES,)
MANUEL MONTEIRO, EDWARD) ORDER GRANTING DEFENDANTS'
ERIKSON, and VERNON NEWMAN,) MOTION TO DISMISS
)
)
Plaintiffs,)
)
v.)
ERIC HOLDER, as United States)
Attorney General, and ROBERT)
MUELLER, III, as Director of the)
Federal Bureau of Investigation,)
and UNITED STATES OF AMERICA,)
)
)
Defendants.)
)

)

This matter is before the Court on Defendants' Eric Holder and Robert Mueller, III (collectively "Defendants") Motion to Dismiss (Doc. #32) Plaintiffs' Richard Enos ("Enos"), Jeff Bastasini ("Bastasini"), Louie Mercado ("Mercado"), Walter Groves ("Groves"), Manuel Monteiro ("Monteiro"), Edward Erickson ("Erickson"), and Vernon Newman ("Newman") Second Amended Complaint ("SAC") (Doc. #27). The Motion to Dismiss is brought pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The above-named

1 plaintiffs opposed the motion. A hearing on the motion to dismiss
2 was held on January 25, 2012. For the reasons set forth below,
3 the Court GRANTS the motion to dismiss.

4

5 I. FACTUAL ALLEGATIONS AND SUMMARY OF ARGUMENTS

6 Plaintiffs, each convicted in California of a misdemeanor
7 crime of domestic violence over ten years ago, allege that they are
8 allowed to possess a firearm under California law but are
9 prohibited from possessing a firearm under federal law.
10 Accordingly, they ask the Court for declaratory relief restoring
11 their right to lawfully possess a firearm under federal law, and
12 challenge the constitutionality of 18 U.S.C. § 922(g)(9), the
13 federal statute which prohibits them from possessing a firearm.

14 Enos plead no contest to a misdemeanor charge under California
15 Penal Code § 273.5(a) in 1991. In 1993 the California Legislature
16 amended Penal Code § 12021 and added charges under Penal Code
17 § 273.5(a) to the list of misdemeanors which prohibit a person from
18 acquiring a firearm for ten years after the date of conviction.
19 After ten years, the right to possess a firearm is restored under
20 California Penal Code 12021(c)(1).¹ In 1996, Congress amended the
21 Violence Against Women Act to include 18 U.S.C. § 922(g)(9), a
22 prohibition against the possession of firearms by misdemeanants
23 convicted of domestic violence. In 1999, Enos petitioned for and
24 received a record clearance under California Penal Code § 1203.4.
25 He also filed a petition for restoration of civil rights under

26

27 ¹ Effective January 1, 2012, California Penal Code § 12021(c)(1)
28 was repealed and reenacted without substantive change as California
Penal Code § 29805. For purposes of clarity, this opinion will
continue to refer to the statute as California Penal Code
§ 12021(c)(1).

1 Penal Code § 12021(c)(3),² which was granted by the Honorable Thang
2 N. Barrett. Accordingly, Enos was permitted to own a firearm by
3 the State of California at that time. However, when he attempted
4 to purchase a gun in 2004, he was denied the purchase and advised
5 that the denial was being maintained by the U.S. Department of
6 Justice, Federal Bureau of Investigation, and the National Instant
7 Criminal Background Check System (NICS).

8 Bastasini, Mercado, Groves and Monteiro each plead no contest
9 or guilty to a misdemeanor charge under California Penal Code
10 273.5, between 1990-1992. They later petitioned for and received
11 record clearance under California Penal Code § 1203.4. They each
12 attempted to purchase a gun in July 2011, and were prohibited from
13 doing so by NICS, after answering "YES" to questions 11.i on ATF
14 Form 4473, which asks if a person has been convicted of a
15 misdemeanor crime of domestic violence.

16 Erickson and Newman were both convicted of misdemeanor crimes
17 of domestic violence, in 1996 and 1997, respectively. They later
18 petitioned for and received record clearance under California Penal
19 Code § 1203.4. Edwards and Newman both attempted to purchase
20 firearms in July 2011 and were prohibited from doing so after
21 answering "YES" to question 11.i on ATF Form 4473.

22 Plaintiffs allege that under California law they are permitted
23 to own a firearm, but that they are prohibited from doing so by
24 federal law. Accordingly, Plaintiffs seek declaratory relief from
25 the Court to restore their right to possess a firearm under federal

26
27 ² Effective January 1, 2012, California Penal Code § 12021(c)(3)
28 was repealed and reenacted without substantive change as California
Penal Code § 29860. For purposes of clarity, this opinion will
continue to refer to the statute as California Penal Code
§ 12021(c)(3).

1 law. The SAC also challenges 18 U.S.C § 922(g)(9) and 18 U.S.C.
2 § 922(d)(9) as unconstitutional under the Second Amendment, both
3 facially and as applied to Plaintiffs.

4 Defendants' motion to dismiss raised a number of arguments in
5 support of dismissing Plaintiffs' claims, several of which were
6 resolved at the hearing. The parties reached a stipulation (Doc.
7 #61) that Plaintiffs may add the United States of America as a
8 defendant, to satisfy the requirements of 18 U.S.C. § 925A.
9 Accordingly, "Defendants" in this order includes the United States
10 of America. Plaintiffs conceded that they no longer seek to
11 maintain their facial challenge to 18 U.S.C. § 922(g)(9), nor their
12 facial and as-applied challenges to 18 U.S.C. § 922(d)(9).³
13 Accordingly those allegations are dismissed from the SAC.

14

15 II. OPINION

16 A. Legal Standard

17 1. Rule 12(b)(1) dismissal

18 A party may move to dismiss an action for lack of subject
19 matter jurisdiction pursuant to Federal Rule of Civil Procedure
20 12(b)(1). When a defendant brings a motion to dismiss for lack of
21 subject matter jurisdiction pursuant to Rule 12(b)(1), the
22 plaintiff has the burden of establishing subject matter
23 jurisdiction. See Rattlesnake Coalition v. United States Envtl.
24 Protection Agency, 509 F.3d 1095, 1102, FN 1 (9th Cir. 2007).

25 2. Rule 12(b)(6) Dismissal

26 A party may move to dismiss an action for failure to state a

27

28 ³ 18 U.S.C. § 922(d)(9) makes it unlawful for any person to sell a firearm or ammunition to a person who has been convicted of misdemeanor domestic violence.

1 claim upon which relief can be granted pursuant to Federal Rule of
2 Civil Procedure 12(b) (6). In considering a motion to dismiss, the
3 court must accept the allegations in the complaint as true and draw
4 all reasonable inferences in favor of the plaintiff. Scheuer v.
5 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
6 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,
7 322 (1972). Assertions that are mere "legal conclusions," however,
8 are not entitled to the assumption of truth. Ashcroft v. Iqbal,
9 129 S. Ct. 1937, 1950 (2009), (citing Bell Atl. Corp. v. Twombly,
10 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a
11 plaintiff needs to plead "enough facts to state a claim to relief
12 that is plausible on its face." Twombly, 550 U.S. at 570.
13 Dismissal is appropriate where the plaintiff fails to state a claim
14 supportable by a cognizable legal theory. Balistreri v. Pacifica
15 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

16 Upon granting a motion to dismiss for failure to state a
17 claim, the court has discretion to allow leave to amend the
18 complaint pursuant to Federal Rule of Civil Procedure 15(a).
19 "Absent prejudice, or a strong showing of any [other relevant]
20 factor[], there exists a presumption under Rule 15(a) in favor of
21 granting leave to amend." Eminence Capital, L.L.C. v. Aspeon,
22 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with
23 prejudice and without leave to amend is not appropriate unless it
24 is clear . . . that the complaint could not be saved by amendment."
25 Id.

26 3. Judicial Notice

27 Generally, the court may not consider material beyond the
28 pleadings in ruling on a motion to dismiss for failure to state a

1 claim. There are two exceptions: when material is attached to the
2 complaint or relied on by the complaint, or when the court takes
3 judicial notice of matters of public record, provided the facts are
4 not subject to reasonable dispute. Sherman v. Stryker Corp., 2009
5 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal citations
6 omitted). Here, Plaintiffs request judicial notice of the stay
7 orders in several Second Amendment cases pending in the Ninth
8 Circuit, as well as the opinion of the First Circuit in a recently
9 decided Second Amendment case. The Court will take judicial notice
10 of the orders and opinion as requested by Plaintiffs, as they are
11 matters of public record.

12 B. Claims for Relief

13 1. Declaratory Relief Claims

14 The first, second and third claims for relief in the SAC seek
15 declaratory relief that Plaintiffs satisfy the requirements of 18
16 U.S.C. § 921(a)(33)(B)(ii) to possess a firearm despite being
17 convicted of a misdemeanor crime of domestic violence. 18 U.S.C. §
18 922(g)(9), also known as the Lautenberg Amendment, makes it
19 unlawful for any person who has been convicted in any court of a
20 misdemeanor crime of domestic violence to ship or transport in
21 interstate or foreign commerce, or possess in or affecting
22 commerce, any firearm or ammunition; or to receive any firearm or
23 ammunition which has been shipped or transported in interstate or
24 foreign commerce. Under 18 U.S.C. § 925A, any person who was not
25 prohibited from receipt of a firearm pursuant to section 922(g) may
26 bring an action against the State or political subdivision
27 responsible for providing erroneous information, or responsible for
28 denying the transfer, or against the United States, as the case may

1 be, for an order directing that the erroneous information be
2 corrected or that the transfer be approved, as the case may be. 18
3 U.S.C. § 925A(2).

4 18 U.S.C. § 921(a)(33) defines a "misdemeanor crime of
5 domestic violence" as a misdemeanor that has as an element the use
6 or attempted use of physical force, or the threatened use of a
7 deadly weapon, committed by a current or former spouse, parent or
8 guardian of the victim, by a person with whom the victim shares a
9 child in common, by a person who is cohabiting with or has
10 cohabited with the victim as a spouse, parent, or guardian, or by a
11 person similarly situated to a spouse parent, or guardian of the
12 victim. However, the statute provides that a person shall not be
13 considered to have been convicted of such an offense unless the
14 person was represented by counsel in the case, or knowingly and
15 intelligently waived the right to counsel in the case, and if the
16 prosecution for an offense entitled the person to a jury trial, the
17 case was tried by a jury or the person knowingly and intelligently
18 waived the right to a jury trial, by guilty plea or otherwise. 18
19 U.S.C. § 921(a)(33)(B)(i).

20 18 U.S.C. § 921(a)(33)(B) further provides that "a person
21 shall not be considered to have been convicted of such an offense
22 for purposes of this chapter if the conviction has been expunged or
23 set aside, or is an offense for which the person has been pardoned
24 or has had civil rights restored (if the law of the applicable
25 jurisdiction provides for the loss of civil rights under such an
offense) unless the pardon, expungement, or restoration of civil
rights, expressly provides that the person may not ship, transport,
26 posses, or receive firearms." 18 U.S.C. § 921(a)(33)(B)(ii).

1 Plaintiffs argue that under federal law they should be
2 considered as having had their civil rights restored, because by
3 operation of law (the passage of ten years as provided for by Penal
4 Code 12021) their right to possess a firearm has been restored by
5 the State of California. Alternatively they argue that they were
6 not convicted of misdemeanor domestic violence under 18 U.S.C.
7 § 921(a)(33)(b)(i) because they were unable to make a knowing and
8 intelligent waiver of their right to a jury trial at the time of
9 their convictions, since 18 U.S.C. § 922(g)(9) had not yet been
10 enacted.

11 Defendants moved to dismiss the declaratory relief claims,
12 arguing that Plaintiffs were convicted of misdemeanor domestic
13 violence because they knowingly and intelligently waived their
14 rights to a jury trial, and that restoration by operation of
15 California law of Plaintiffs' right to possess a firearm does not
16 qualify as restoration of civil right under 18 U.S.C.
17 § 921(a)(33)(B)(ii).

18 a. Waiver of Right to Jury Trial

19 As an initial matter, Plaintiffs cited no authority for the
20 proposition that, in a civil proceeding brought under 18 U.S.C.
21 § 925A, the Court would have jurisdiction to determine that an
22 individual's waiver of his or her right to a jury trial that was
23 made in a state criminal proceeding was not knowing and
24 intelligent. Even assuming the Court has jurisdiction, Plaintiffs'
25 arguments lack merit because when a person enters a guilty or no
26 contest plea, he or she must only be advised of all direct
27 consequences of the conviction. Bunnell v. Superior Court, 13
28 Cal.3d 592, 605 (1975). This requirement relates to the primary

1 and direct consequences involved in the criminal case itself and
2 not secondary, indirect or collateral consequences. People v.
3 Arnold, 33 Cal.4th 294, 309 (2004). The possible future use of a
4 current conviction is not a direct consequence of the conviction.
5 People v. Gurule, 28 Cal.4th 557, 634 (2002).

6 Plaintiffs contend that Padilla v. Kentucky, 130 S. Ct. 1473
7 (2010), in which the Supreme Court found that counsel had an
8 obligation to advise his client that the offense to which he was
9 pleading guilty was a deportable offense, supports Plaintiffs'
10 argument regarding knowing and intelligent waiver and collateral
11 consequences. However, Padilla is not analogous, and does not
12 support Plaintiffs' theory. Accordingly, the Court dismisses the
13 allegations that at the time Plaintiffs plead to their convictions,
14 they were unable to make a knowing and intelligent waiver of their
15 right to a jury trial because they were not apprised of the
16 possibility of losing their right to possess a firearm. Congress
17 had not yet enacted 18 U.S.C. § 922(g)(9), and the law does not
18 require Plaintiffs to be advised of future unanticipated changes in
19 the law.

20 b. Restoration of Civil Rights

21 Defendants also argue that Plaintiffs have not had their civil
22 rights restored, and have not otherwise satisfied the requirements
23 of 18 U.S.C. § 921(a)(33)(B)(ii) to regain their right to possess a
24 firearm. Though Plaintiffs sought relief under California Penal
25 Code § 1203.4 to have their records cleared, the Ninth Circuit has
26 already held that this does not qualify as expungement under 18
27 U.S.C. § 921(a)(33)(B)(ii). Jennings v. Mukasey, 511 F.3d 894
28 (2007). Likewise, Defendants contend that the passage of ten years

1 from the date of the conviction, while restoring the right to
2 possess a firearm under California law, does not restore
3 Plaintiffs' right to possess a firearm under federal law.

4 Defendants assert that, as has been recognized by numerous
5 courts, the test for whether civil rights have been restored is
6 whether an individual's right to vote, sit on a jury, or hold
7 elected office has been restored. See United States v. Andaverde,
8 64 F.3d 1305, 1309 (1995) (stating that in considering whether an
9 individual's civil rights have been restored, the "Ninth Circuit
10 considers whether the felon has been restored the right to vote, to
11 sit on a jury and hold public office"); United States v. Dahms, 938
12 F.2d 131, 133 (9th Cir. 1991) (stating that an individual "who,
13 having first lost them upon conviction, regains the right to vote,
14 sit on a jury, and hold public office in the state in which he was
15 originally convicted has had his civil rights restore . . .");
16 United States v. Gomez, 911 F.2d 219, 220 (9th Cir. 1990) (stating
17 that the intent of Congress in using the phrase "civil rights
18 restored" under 18 U.S.C. § 921(a)(20) was to give effect to state
19 reforms with respect to the status of an ex-convict).

20 Because Plaintiffs do not allege they lost the right to vote,
21 sit on a jury or hold public office, Defendants argue they cannot
22 allege that their rights have been restored within the meaning of
23 the statute. See Logan v. United States, 552 U.S. 23, 36 (2007)
24 ("the words 'civil rights restored' do not cover a person whose
25 civil rights were never taken away"); United States v. Brailey,
26 408 F.3d 609, 613 (9th Cir. 2005) ("Because Brailey's misdemeanor
27 conviction did not remove Brailey's core civil rights of voting,
28 serving as a juror, or holding public office, his civil rights have

1 not been restored within the meaning of federal law by Utah's 2000
2 amendment permitting him to possess a firearm"). Restoration of
3 the right to bear arms is insufficient to qualify as 'restoration
4 of rights,' as restoration must be substantial, not de minimus.
5 Andaverde, 64 F.3d at 1309 (analyzing restoration of rights in the
6 context of a felon-in-possession).

7 Plaintiffs contend that following the Supreme Court's
8 decisions in District of Columbia v. Heller, 554 U.S. 570 (2008),
9 and McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), which
10 recognized the right to bear arms as a fundamental individual
11 right, the Court should re-interpret the "restoration of rights"
12 provision as including cases such as Plaintiffs, where the only
13 right that was taken away and then restored was the right to
14 possess a firearm. Plaintiffs argue that the Court should
15 disregard cases decided pre-Heller, such as Brailey. Further,
16 Plaintiffs assert that because few, if any, states take away a
17 misdemeanants right to vote, sit on a jury, or hold elected office,
18 interpreting "civil rights" to include only these three rights, and
19 not firearm rights, makes little sense and can result in a lifetime
20 ban on firearms possession. Plaintiffs allege that they are facing
21 such a lifetime ban, as they have no means under state law to have
22 their convictions expunged, set aside, or pardoned, and their
23 rights to vote, sit on a jury or hold public office were never
24 taken away and restored.

25 In response, Defendants argue that the Court should still
26 follow Brailey; that its timing as a pre-Heller case is
27 inconsequential for several reasons. First, the right to bear arms
28 recognized by Heller is not among the cluster of rights (the right

1 to vote, sit on a jury, and hold public office) typically
2 recognized by courts when analyzing whether an individual's civil
3 rights have been restored. See e.g. Andaverde, 64 F.3d at 1309;
4 Logan, 552 U.S. at 36; Dahms, 938 F.2d at 133; Gomez, 911 F.2d at
5 220.

6 Second, Defendants note that 18 U.S.C. § 921(a)(33)(B)(ii)
7 refers to civil rights in the plural, thus even if the right to
8 possess a firearm was recognized under state law as having been
9 restored, this would be insufficient to fulfill the restoration of
10 rights contemplated by the statute. See e.g. United States v.
11 Keeney, 241 F.3d 1040, 1044 (8th Cir. 2001) ("Significantly
12 921(a)(20) and 921(a)(33)(B)(ii) both refer to civil rights in the
13 plural, thus suggesting that Congress intended to include a cluster
14 of rights, as referenced in McGrath, within the meaning of the term
15 "civil rights" as contained in these provisions") (citing McGrath
16 v. United States, 60 F.3d 1005 (2d Cir. 1995); United States v.
17 Meeks, 987 F.2d 575, 578 (9th Cir. 1993) (holding that an
18 individual whose rights to vote and hold office had been restored,
19 but not his right to serve on a jury, had not had his "civil rights
20 restored"); United States v. Valerio, 441 F.3d 837, 843 (9th Cir.
21 2006) (noting that the individual's right to vote and right posses
22 firearms had been restored, but holding that this is not enough).
23 Even post-Heller, the Seventh Circuit in United States v. Skoien,
24 614 F.3d 638, 644-45 (7th Cir. 2010) (en banc) discussed "civil
25 rights" under 18 U.S.C. § 921(a)(33)(B)(ii) as consisting of the
26 right to vote, serve on a jury, and hold public office.⁴

27
28

⁴ The Court notes however that the Skoien Court's subsequent
statement, that California law provides a means for expungement of
misdemeanor domestic violence convictions through California Penal

1 Plaintiffs countered this argument, both in their opposition
2 papers and again at oral argument, with the theory that the Second
3 Amendment protects multiple rights. Plaintiffs assert that the
4 right to keep and the right to bear arms are different rights,
5 making up part of a "bundle of rights" protected by the Second
6 Amendment, and restored by the State of California. Plaintiffs
7 contend that Heller and McDonald both recognized multiple rights as
8 protected by the Second Amendment, but Defendants assert that both
9 decisions refer to a singular right.

10 Having carefully reviewed the Heller and McDonald opinions,
11 the Court notes that throughout both opinions the majority refers
12 to a singular right to keep and bear arms protected by the Second
13 Amendment. The Heller majority did note that Justice Stevens in
14 his dissent "believes that the unitary meaning of "keep and bear
15 Arms" is established by the Second Amendment's calling it a "right"
16 (singular) rather than "rights" (plural). . . There is nothing to
17 this. State constitutions of the founding period routinely grouped
18 multiple (related) guarantees under a singular "right,". . ."
19 Heller at 591. However, whether this Court views the Second
20 Amendment as securing a singular right, plural rights, or "multiple
21 related guarantees," it still finds that this does not put
22 restoration of an individuals' right to possess a firearm within
23 the purview of "civil rights restored," which courts have
24 repeatedly classified as the right to vote, hold public office and
25

26 Code 1203.4a, is a misstatement of California law. Additionally,
27 the California legislature recently amended 1203.4a foreclosing
28 Plaintiffs' ability to seek relief through that statute. As
discussed at oral argument, neither 1203.4 or 1203.4a are available
to Plaintiffs to seek the equivalent of an expungment or set aside
of their convictions under 18 U.S.C. § 921(a)(33)(B)(ii).

1 sit on a jury.

2 Lastly, Defendants urge the Court to look to congressional
3 intent, reasoning that Congress, when enacting § 922(g)(9) and
4 § 921 and in 1996, did not intend for the right to bear arms to be
5 included as a "civil right" for purposes of restoration under 18
6 U.S.C. § 921(a)(33)(b)(ii). Indeed, as Defendants argue, common
7 sense dictates that the Legislature in 1996 could not have intended
8 "civil rights" to include a right that the Supreme Court did not
9 recognize until Heller in 2008.

10 Plaintiffs were unable to cite to any case supporting their
11 argument that the restoration of an individual's right to possess a
12 firearm constitutes a restoration of "civil rights" under 18 U.S.C.
13 § 921(a)(33)(B)(ii). To find that Plaintiffs have stated a claim
14 for the declaratory relief that they seek, this Court would be
15 required to interpret 18 U.S.C. § (921)(a)(33)(B)(ii) in a way that
16 no other court has, thus far, interpreted this statute. Likewise,
17 Plaintiffs were unable to cite to any case law in support of their
18 argument that Brailey and the cases cited above regarding the
19 meaning of "civil rights restored" should no longer be followed
20 because they were decided prior to Heller. The Court finds that as
21 a matter of law, Plaintiffs have not alleged facts showing that
22 their civil rights have been restored. Even Enos, whose record
23 clearance was granted by a Superior Court judge, has not shown that
24 he meets the requirements of 18 U.S.C. § 921(a)(33)(B)(ii).

25 Though Plaintiffs ask the Court to base a new interpretation
26 of the statute on the Supreme Court's holdings in Heller and
27 McDonald, this Court finds greater merit in Defendants argument
28 that it is the role of the legislature, not this Court, to change

1 or re-write the statute at issue in this case. As was discussed at
2 the hearing, nothing prevents Plaintiffs from petitioning Congress
3 to change the law, as citizens often do when they are unhappy with
4 the way a bill is written. Defendants argued that Plaintiffs are
5 free to ask their legislator(s) to sponsor a bill before Congress
6 to change the language of 18 U.S.C. § 921(a)(33)(b)(ii), and raise
7 before Congress the same arguments that Plaintiffs raise before
8 this Court.

9 In light of the extensive case law holding otherwise, and
10 looking to Congress' intent when creating this exception to §
11 922(g)(9), this Court refuses Plaintiffs' invitation to create a
12 new interpretation of "civil rights restored" under 18 U.S.C. §
13 921(a)(33)(B)(ii). The SAC fails to plead facts showing that
14 Plaintiffs' civil rights have been restored within the meaning of
15 18 U.S.C. § 921(a)(33)(B)(ii), or that they have otherwise
16 fulfilled the requirements of the statute, and further amendment
17 would be futile. Accordingly, the motion to dismiss Plaintiffs'
18 claims for declaratory relief is granted, and the claims are
19 dismissed with prejudice.

20 2. Second Amendment Constitutional Claim

21 Plaintiffs' fourth claim for relief argues that absent
22 declaratory relief from the Court finding that they have satisfied
23 the requirements of 18 U.S.C. § 921(a)(33)(B)(ii), 18 U.S.C.
24 § 922(g)(9) amounts to a lifetime ban on their right to own a
25 firearm, in violation of the Second Amendment. Defendants contend
26 that the SAC fails to state a claim, because 18 U.S.C. § 922(g)(9)
27 is constitutional, even when, as alleged by Plaintiffs, it results
28 in a lifetime ban on firearm possession.

1 In United States v. Vongxay, 594 F.3d 1111 (9th Cir. 2010),
2 the Ninth Circuit analyzed the constitutionality of 18 U.S.C.
3 § 922(g)(1), which prohibits persons with felony convictions from
4 possessing firearms. The Ninth Circuit found that § 922(g)(1)
5 remained constitutional under the Second Amendment, despite the
6 Heller decision, as denying felons the right to bear arms is
7 consistent with the explicit purpose of the Second Amendment to
8 maintain the security of a free State. Id. at 1117. The Ninth
9 Circuit noted that the Court in Heller specifically stated that,
10 "nothing in our opinion should be taken to cast doubt on the
11 longstanding prohibitions on the possession of firearms by felons
12 and the mentally ill . . . we identify these presumptively lawful
13 regulatory measures only as examples; our list does not purport to
14 be exhaustive." Vongxay, 594 F.3d at 1115 (citing Heller, 128 S.
15 Ct. at 2817, n. 26). After discussing the extensive case law
16 upholding § 922(g)(1), the Ninth Circuit found that § 921(g)(1)
17 does not violate the Second Amendment as it applied to Mr. Vongxay,
18 a convicted felon. Accordingly, Defendants urge this Court to
19 grant the motion to dismiss, extending the Ninth Circuit's holding
20 in Vongxay to find that that § 922(g)(9) is lawful under Heller,
21 and does not violate the Second Amendment as applied to Plaintiffs'
22 convicted domestic violence misdemeanants.

23 The Ninth Circuit did not apply any level of scrutiny in
24 reaching their decision on the constitutionality of § 922(g)(1)
25 under the Second Amendment. It was not until the Court analyzed
26 the accompanying equal protection claim that they applied
27 constitutional scrutiny. No equal protection claim is alleged in
28 the SAC, and Defendants urge this Court to follow the Ninth Circuit

1 by deciding the Second Amendment claims without applying
2 constitutional scrutiny. Though the parties argued at length
3 during oral argument about the appropriate level of scrutiny to
4 apply to a Second Amendment challenge, the appropriate level of
5 scrutiny has not been designated by the Supreme Court or the Ninth
6 Circuit, and this Court need not reach that question in order to
7 decide this motion.

8 Numerous courts have found 18 U.S.C. § 922(g)(9) to be
9 presumptively lawful under District of Columbia v. Heller, 554 U.S.
10 570 (2008). See e.g. United States v. White, 593 F.3d 1199, 1206
11 (11th Cir. 2010) ("we now explicitly hold that 922(g)(9) is a
12 presumptively lawful longstanding prohibition on the possession of
13 firearms"); United States v. Booker, 644 F. 3d 12, 24 (1st Cir.
14 2011) ("indeed, 922(g)(9) fits comfortably among the categories of
15 regulations that Heller suggested would be presumptively lawful");
16 In re United States, 578 F.3d 1195 (10th Cir. 2009) ("nothing
17 suggests that the Heller dictum, which we must follow, is not
18 inclusive of § 922(g)(9) involving those convicted of misdemeanor
19 domestic violence"); United States v. Smith, 742 F.Supp.2d 855, 863
20 (S.D. W. Va. 2010) ("therefore, 922(g)(9) should be considered
21 presumptively lawful, and it is the opinion of this Court that the
22 statute may be upheld on that basis alone").

23 Defendants argue that the Ninth Circuit has already held that
24 felons are not protected by the Second Amendment in Vongxay, and
25 the Court should extend similar reasoning to domestic violence
26 misdemeanants. All felons, whether violent or not, are
27 disqualified from protection under the Second Amendment. Vongxay,
28 594 F.3d at 1116. However, § 922(g)(9) does not apply to all

1 misdemeanants; it singles out only those who have committed violent
2 acts against their intimate partners, children or other family
3 members. See United States v. Hayes, 129 S. Ct. 1079, 1087 (2009)
4 (noting that Congress enacted § 922(g)(9) out of concern that
5 existing felon-in-possession laws were not keeping firearms out of
6 the hands of domestic abusers, because many people who engage in
7 serious spousal or child abuse ultimately are not charged with or
8 convicted of felonies).

9 Plaintiffs have argued that unless the Court agrees to re-
10 interpret § 921(a)(33)(B)(ii) and grant Plaintiffs' the declaratory
11 relief that they seek, then § 921(a)(33)(B)(ii) along with
12 § 922(g)(9) results in an unconstitutional lifetime ban on
13 Plaintiffs' ability to possess firearms. Plaintiffs did not cite
14 to any cases which have found § 922(g)(9) to be constitutionally
15 suspect, but argue that without a means to restore their rights or
16 have their convictions set aside or otherwise pardoned or expunged,
17 § 922(g)(9) cannot pass constitutional muster.

18 Defendants note that courts have said that for the same
19 reasons the Supreme Court articulated for stating that the long
20 standing prohibitions referred to in Heller remain presumptively
21 lawful (i.e., the prohibitions pertaining to felons and the
22 mentally ill), there is an even stronger reason for finding that
23 persons convicted of misdemeanor crimes of domestic violence should
24 not be protected by the Second Amendment. See e.g. Smith, 742
25 F.Supp.2d at 863 (stating that the definitional net of § 922(g)(9)
26 is more narrowly crafted than that of § 922(g)(1), another
27 compelling reason to uphold § 922(g)(9) by analogy to § 922(g)(1));
28 White, 593 F.3d at 1206 (noting that in contrast to a felon, who

1 could be convicted of a violent or non-violent act, a person
2 convicted under § 922(g)(9) must have first acted violently toward
3 a family member or domestic partner).

4 Thus, even if § 922(g)(9) imposes a lifetime ban on a domestic
5 violence misdemeanant's ability to possess a firearm, Defendants
6 argue that such a result is constitutional due to the nature of the
7 specific crime committed. Defendants cite Skoien, 614 F.3d at
8 645 and Smith, 742 F.Supp.2d at 869 in support of the argument that
9 § 922(g)(9) is not necessarily a lifetime ban as
10 § 921(a)(33)(b)(ii) provides relief to some individuals, but even
11 if it is, it remains constitutional. The court in Skoien
12 acknowledged that the statute tolerates different outcomes for
13 persons convicted in different states, but noted that this is true
14 of all situations in which a firearms disability or other adverse
15 consequence depends on state law and this variability does not call
16 into question federal firearms limits based on state convictions
17 that have been left in place under the states' widely disparate
18 approaches to restoring civil rights. The court in Smith reasoned
19 that:

20 It is clear from the federal law that the majority of
21 domestic violence offenders will not regain their
22 firearms possession right. However, there are
23 procedures for the restoration of the right . . . It
is up to state legislatures to constrict or expand the
ease with which convicted misdemeanants may apply for
a receive relief under these measures.

24 The Court finds Defendants' arguments, and the case law, to be
25 persuasive that § 922(g)(9) is a presumptively lawful categorical
26 ban on firearm possession. Keeping guns out of the hands of those
27 convicted of domestic violence fits squarely into the prohibitions
28 noted by Heller. Plaintiffs, as convicted domestic violence

1 misdemeanants, fall within that categorical ban, thus the Second
2 Amendment does not apply to them. Indeed, Plaintiffs themselves do
3 not argue against the extensive case law that has found § 922(g)(9)
4 to be presumptively lawful.

5 Upon determining that the statute is presumptively lawful, a
6 court may end its inquiry there. See e.g. White, 593 F.3d at 1206
7 (holding 922(g)(9) to be presumptively lawful and ending its
8 inquiry there); Smith, 742 F. Supp. at 859 (discussing how some
9 courts have found 922(g)(9) to be presumptively constitutional and
10 end their analysis there, while other courts conduct an individual
11 analysis of the statutory section at issue, determine the
12 appropriate level of constitutional scrutiny to apply, and then
13 scrutinize the statute in light of the facts before the court).
14 Thus because this Court finds that § 922(g)(9) warrants inclusion
15 on Heller's list of presumptively lawful longstanding prohibitions
16 on the right to bear arms, no further constitutional scrutiny is
17 required.

18 The SAC also attempts to plead an as-applied challenge. To
19 raise a successful as-applied challenge, a plaintiff must present
20 facts about himself and his background that distinguish his
21 circumstances from those of persons historically barred from Second
22 Amendment protections. United States v. Barton, 633 F.3d 168, 174
23 (3rd Cir. 2011). The SAC describes Plaintiffs' convictions as
24 "minor," yet domestic violence misdemeanants are, by statutory
25 definition, violent criminals. Smith, 742 F.Supp.2d at 869.
Defendants argue that Plaintiffs have not alleged facts about
themselves and their backgrounds that distinguish their
circumstances from other domestic violence misdemeanants who are

1 disqualified from firearm possession under § 922(g)(9).

2 The Court notes that at oral argument, for the first time,
3 Defendants raised the issue that Plaintiffs' Second Amendment "as-
4 applied" challenge could actually be characterized as a facial
5 overbreadth challenge, because § 922(g)(9) has not been "applied"
6 to Plaintiffs. Defendants argue that it has not been applied
7 because Plaintiffs have not been arrested and charged with
8 possession of a firearm in violation of § 922(g)(9), which is the
9 route by which challenges to § 922(g)(9) typically reach courts.
10 Defendants stated that Plaintiffs would have standing to bring an
11 overbreadth challenge, but did not explicitly argue that Plaintiffs
12 lack standing to bring an "as-applied" challenge. Plaintiffs for
13 their part did not dispute the characterization of their challenge
14 as being one of overbreadth, though the SAC pleads that the statute
15 is unconstitutional as applied to them, not that Congress
16 overreached by creating a perpetual disqualification for persons
17 convicted of misdemeanor domestic violence.

18 Such an overbreadth argument was advanced by the defendant in
19 Skoien, 614 F.3d at 644-45. The Seventh Circuit ultimately
20 declined to reach this argument because it found that the statute
21 was properly applied to the defendant, and thus he was not able to
22 obtain relief based on arguments that a differently situated person
23 might present. Id. at 945. Likewise, the defendant in Smith, 742
24 F.Supp.2d at 868-69, argued that the difficulty of securing a
25 pardon or expungement under either state or federal law,
26 § 922(g)(9) operates as a complete ban on firearm ownership in
27 perpetuity. The Smith court held that even assuming the defendant
28 was permanently banned from future firearm possession, § 922(g)(9)

was reasonably tailored to accomplish a compelling government interest.

Here, the parties did not engage in extensive argument over whether the SAC presents an overbreadth or as-applied challenge, and Defendants did not brief the issue in their motion to dismiss or reply briefs. However, in the Court's view the characterization of the precise nature of Plaintiffs' Second Amendment challenge does not change the outcome. Whether this Court views the SAC as bringing an as-applied challenge or an overbreadth challenge, the Court does not find that Plaintiffs have stated a claim for violation of the Second Amendment. The Court finds that § 922(g)(9) is a presumptively lawful categorical ban under Heller, and extends the Ninth Circuit's ruling in Vongxay to hold that § 922(g)(9) does not violate the Second Amendment as applied to Plaintiffs, convicted domestic violence misdemeanants. Plaintiffs have not set forth facts to rebut that presumption of lawfulness, distinguishing them from other domestic violence misdemeanants sufficiently to state an as-applied or overbreadth challenge. Accordingly, Plaintiffs' have not stated a claim for violation of the Second Amendment. Plaintiffs have already amended the complaint twice and further amendment would be futile. Accordingly the dismissal is with prejudice.

III. ORDER

The Motion to Dismiss is GRANTED, and Plaintiffs' SAC is DISMISSED, WITH PREJUDICE. The March 21, 2012 hearing on Plaintiffs motion for summary judgment is vacated.

IT IS SO ORDERED.

Dated: February 28, 2012


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

12 RICHARD ENOS, JEFF
13 BASTASINI, LOUIE MERCADO,
14 WALTER GROVES, MANUEL
15 MONTEIRO, EDWARD ERIKSON
16 and VERNON NEWMAN,

17 Plaintiffs,

18 vs.

19 ERIC HOLDER, as United States
20 Attorney General, and ROBERT
21 MUELLER, III, as Director of the
22 Federal Bureau of Investigation,

23 Defendants.

24 CASE NO.: 2:10-CV-02911-JAM-EFB

25 SECOND AMENDED COMPLAINT
26 AND REQUEST FOR
27 INJUNCTIVE/DECLARATORY
28 RELIEF

29 VIOLATIONS OF THE SECOND
30 AMENDMENT OF THE UNITED STATES
31 CONSTITUTION

32 18 U.S.C. § 921 *et seq.*
33 18 U.S.C. § 922 *et seq.*
34 18 U.S.C. § 925A
35 28 U.S.C. § 2412
36 42 U.S.C. § 1988

37 **PARTIES**

- 38 1. Plaintiff RICHARD ENOS, is an individual who is a citizen/resident of the
39 State of California. ENOS lives in San Joaquin County.
40 2. Plaintiff JEFF BASTASINI, is an individual who is a citizen/resident of the
41 State of California.
42 3. Plaintiff LOUIE MERCADO, is an individual who is a citizen/resident of the
43 State of California.

4. Plaintiff WALTER GROVES, is an individual who is a citizen/resident of the State of California.
5. Plaintiff MANUEL MONTEIRO, is an individual who is a citizen/resident of the State of California.
6. Plaintiff EDWARD ERIKSON, is an individual who is a citizen/resident of the State of California.
7. Plaintiff VERNON NEWMAN, is an individual who is a citizen/resident of the State of California.
8. Defendant ERIC HOLDER is the United States Attorney General and is charged with interpretation and enforcement of 18 U.S.C. §§ 921 *et seq.* and 922 *et seq.*
9. Defendant ROBERT MUELLER, III is the Director of the Federal Bureau of Investigation and is charged with interpretation and enforcement of 18 U.S.C. §§ 921 *et seq.* and 922 *et seq.*

JURISDICTION AND VENUE

10. This Court has jurisdiction over the lawsuit because the action arises under 18 U.S.C. §§ 921 *et seq.*, 922 *et seq.* and 925A.
11. As this action arises under the United States Constitution this Court also has jurisdiction pursuant to 28 U.S.C. § 1331.
12. As the Plaintiffs are seeking declaratory relief, this Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 2201 and 2202.
13. Venue for this action is properly in this District pursuant to 28 U.S.C. § 1391.
14. All conditions precedent, including exhaustion of administrative remedies where required, have been performed, have occurred, are futile or unnecessary where the government infringes on a fundamental right.

FACTS

15. The State of California works in conjunction with the Federal Government to interpret statutes and implementing regulations that restrict the “right to

1 keep and bear arms" of people convicted of Misdemeanor Crimes of Domestic
2 Violence.

3 16. The Federal Government's definition of Misdemeanor Crimes of Domestic
4 Violence is found at 18 U.S.C. § 921(a)(33):

5 (33) (A) Except as provided in subparagraph (C), the term "misdemeanor
6 crime of domestic violence" means an offense that--

7 (i) is a misdemeanor under Federal or State law; and

8 (ii) has, as an element, the use or attempted use of physical force, or
9 the threatened use of a deadly weapon, committed by a current or former
10 spouse, parent, or guardian of the victim, by a person with whom the victim
11 shares a child in common, by a person who is cohabiting with or has
12 cohabited with the victim as a spouse, parent, or guardian, or by a person
13 similarly situated to a spouse, parent, or guardian of the victim.

14 (B) (i) A person shall not be considered to have been convicted of such
15 an offense for purposes of this chapter [18 USCS §§ 921 et seq.], unless--

16 (I) the person was represented by counsel in the case, or knowingly
17 and intelligently waived the right to counsel in the case; and

18 (II) in the case of a prosecution for an offense described in this
19 paragraph for which a person was entitled to a jury trial in the jurisdiction in
20 which the case was tried, either

21 (aa) the case was tried by a jury, or

22 (bb) the person knowingly and intelligently waived the right to have
23 the case tried by a jury, by guilty plea or otherwise.

24 (ii) A person shall not be considered to have been convicted of such an
25 offense for purposes of this chapter [18 USCS §§ 921 et seq.] if the
26 conviction has been expunged or set aside, or is an offense for which the
27 person has been pardoned or has had civil rights restored (if the law of the
28 applicable jurisdiction provides for the loss of civil rights under such an
offense) unless the pardon, expungement, or restoration of civil rights
expressly provides that the person may not ship, transport, possess, or
receive firearms.

29 17. It is a federal criminal offense for any person, including a federally licensed
30 firearm dealer, to sell or dispose of any firearm to a person who has been
31 convicted of a Misdemeanor Crime of Domestic Violence. 18 U.S.C. § 922(d)(9).

18. It is federal criminal offense for any person who has been convicted of a
1 Misdemeanor Crime of Domestic Violence to possess a firearm. 18 U.S.C. §
2 922(g)(9).
 19. Thus Federal Law imposes a lifetime ban on the “right to keep and bear arms”
5 for persons convicted of Misdemeanor Crimes of Domestic Violence, subject to
6 the individual states’ power to restore these fundamental civil rights under
7 state law.
 20. Federal Law provides a means for felons to have their “right to keep and bear
9 arms” restored under procedures promulgated and implemented by the
10 Attorney General. 18 U.S.C. § 925(c).
 21. California Penal Code § 12021(c)(1) sets forth a list of specific crimes that
12 subject a person convicted of certain misdemeanors to a ten (10) year
13 prohibition against owning, possessing and purchasing firearms (and
14 ammunition). This list includes, but is not limited to the following
15 Misdemeanor Crimes of Domestic Violence:
 16. a. Battery Against a Spouse/Cohabitant. CA Penal Code § 243(e).
 17. b. Corporal Injury to Spouse/Cohabitant. CA Penal Code § 273.5.
 22. Pursuant to Penal Code § 12021(c)(1), the State of California has clearly and
19 unequivocally set forth a policy of limiting firearms prohibitions, for persons
20 convicted of Misdemeanor Crimes of Domestic Violence, to a ten (10) year
21 period such that by the passage of time the misdemeanants’ “right to keep and
22 bear arms” is restored, without qualification, by operation of law.
 23. California Penal Code § 12021(c)(3) also provides the means for a person
24 convicted of a Misdemeanor Crime of Domestic Violence, prior to the date the
25 state law went into effect, to have a Superior Court Judge restore the
26 fundamental “right to keep and bear arms” on a case by case basis.
 27. Even though The State of California has a policy of restoring the “right to
28 keep and bear arms” through a hearing process and by operation of law

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(through the passage of time), the Federal Government refuses to recognize California's restoration of rights and rehabilitation policies.

25. Some time during or prior to 2004, the Federal Government informed the State of California that the federal government would not recognize that State's restoration of gun rights procedures and that California was required to deny firearms purchases and possession of firearms and ammunition to all persons convicted of misdemeanor crimes of domestic violence under the supremacy clause of the Constitution and the Federal Government's interpretation of the 18 U.S.C. §§ 921, 922 *et seq.*
26. As a direct consequence of the Federal Government's refusal to recognize California's restoration and rehabilitation policies, Plaintiffs herein (and all other persons similarly situated) continue to be subject to a lifetime prohibition of the "right to keep and bear arms" under Federal Law.
27. This interpretation of the law by the Federal Government results in three (3) wrongful and unconstitutional consequences:
 - a. Plaintiffs (and all other persons similarly situated) are subject to federal criminal prosecution if they attempt to exercise their fundamental "right to keep and bear arms" after the State of California has restored their rights.
 - b. Plaintiffs (and all other persons similarly situated) cannot lawfully purchase a firearm to exercise their fundamental "right to keep and bear arms" because they cannot pass the background check required by state and federal law.
 - c. Plaintiffs, (and all other persons similarly situated) are denied a federal statutory remedy to restore their "right to keep and bear arms" even as convicted felons have a statutory remedy to restore their rights under 18 U.S.C. § 925(c), thus resulting in an irrational scheme of denying fundamental rights to persons convicted of minor crimes.

1 28. Plaintiff ENOS:

- 2 a. On or about July 15, 1991, Plaintiff RICHARD ENOS plead *nolo*
3 *contendere* and was convicted of a misdemeanor violation of California
4 Penal Code § 273.5 (a).
- 5 b. In 1993 the California Legislature amended Penal Code § 12021 and
6 added Penal Code § 273.5 to the list of misdemeanors which prohibit a
7 person from acquiring/possessing a firearm for 10 years after the date of
8 conviction.
- 9 c. On September 13, 1994, the Congress passed the Violence Against
10 Women Act, and in 1996 Congress amended the act to impose a lifetime
11 prohibition against the acquisition/possession of firearms by
12 misdemeanants convicted of Domestic Violence. See: 18 U.S.C. §§ 921
13 and 922 *et seq.*
- 14 d. In March of 1999, Plaintiff RICHARD ENOS, petitioned for a record
15 clearance under Penal Code § 1203.4.
- 16 e. On May 25, 1999, Plaintiff RICHARD ENOS's petition was granted by
17 the Honorable Ray E. Cunningham, Superior Court Judge. Plaintiff's
18 plea of guilty was withdrawn, a plea of not guilty was entered and the
19 court dismissed the case.
- 20 f. On May 12, 2000, Plaintiff RICHARD ENOS filed a PETITION FOR
21 RESTORATION OF CIVIL RIGHTS (FIREARM POSSESSION).
- 22 g. On Jun 16, 2000, the PETITION FOR RESTORATION OF CIVIL
23 RIGHTS (FIREARM POSSESSION) was granted by the Honorable
24 Thang N. Barrett.
- 25 h. In February of 2001, Plaintiff RICHARD ENOS caused a letter to be
26 sent to the California Department of Justice referencing the order by
27 Judge Barrett restoring his rights. At that point in time the State of
28 California had cleared RICHARD ENOS to own/possess firearms.

- 1 i. In August of 2004, Plaintiff RICHARD ENOS was denied a firearm
2 purchase and advised by the State of California that the denial was
3 being maintained by U.S. Department of Justice, Federal Bureau of
4 Investigation, National Instant Criminal Background Check System.
- 5 j. As of August 29, 2011, Plaintiff RICHARD ENOS is permitted to
6 acquire and possess firearms under the laws of the State of California.
- 7 k. As of August 29, 2011, Plaintiff RICHARD ENOS is prohibited from
8 acquiring and possessing firearms due to threat of criminal prosecution
9 under federal law.
- 10 l. But for Defendants' wrongful interpretation of the federal laws
11 regulating firearm possession and purchase by domestic violence
12 misdemeanants, Plaintiff RICHARD ENOS would acquire, keep and
13 bear arms for, among other lawful purposes, self-defense in his home.
- 14 29. Plaintiff BASTASINI:
- 15 a. On or about March 25, 1991, Plaintiff BASTASINI plead *nolo*
16 *contendre* in a Santa Clara County Superior Court to two counts of a
17 misdemeanor crime of domestic violence under Penal Code §§ 273.5 and
18 242. He was not represented by counsel.
- 19 b. In 1993 the California Legislature amended Penal Code § 12021 and
20 added Penal Code § 273.5 and 242 to the list of misdemeanors which
21 prohibit a person from acquiring/possessing a firearm for 10 years after
22 the date of conviction.
- 23 c. On September 13, 1994, the Congress passed the Violence Against
24 Women Act, and in 1996 Congress amended the act to impose a lifetime
25 prohibition against the acquisition/possession of firearms by
26 misdemeanants convicted of Domestic Violence. See: 18 U.S.C. §§ 921
27 and 922 *et seq.*
- 28 d. On or about August 21, 2000, Plaintiff BASTASINI, petitioned for a

- 1 record clearance under Penal Code § 1203.4.
- 2 e. On or about September 20, 2000, the Superior Court of Santa Clara
- 3 County granted Plaintiff BASTASINI's petition under Penal Code §
- 4 1203.4. Plaintiff's plea was withdrawn, a plea of not guilty was entered
- 5 and the court dismissed the case.
- 6 f. Subsequent to California's restoration of his right to "keep and bear
- 7 arms" under the California law, Plaintiff BASTASINI obtained a
- 8 firearm permit from the California Bureau of Security and
- 9 Investigative Services.
- 10 g. On or about February 16, 2006, Plaintiff BASTASINI was informed
- 11 that his Firearm Permit was being revoked under the lifetime
- 12 prohibition imposed by federal law for his conviction on March 25, 1991.
- 13 h. On July 11, 2011, Plaintiff BASTASINI applied for a firearm purchase
- 14 at federally licensed firearm dealer. Plaintiff correctly filled out the
- 15 ATF Form 4473 (5300.9) and truthfully answered "YES" to question
- 16 11.i.
- 17 i. On July 18, 2011, Plaintiff BASTASINI was denied a firearm purchase.
- 18 Upon making an inquiry to the California Department of Justice for the
- 19 reason for the denial, BASTASINI was informed that federal law
- 20 prohibited his clearance to purchase the gun and that he should direct
- 21 his questions to federal authorities.
- 22 j. As of August 29, 2011, Plaintiff BASTASINI is permitted to acquire
- 23 and possess firearms under the laws of the State of California.
- 24 k. As of August 29, 2011, Plaintiff BASTASINI is prohibited from
- 25 acquiring and possessing firearms due to threat of criminal prosecution
- 26 under federal law.
- 27 l. But for Defendants' wrongful interpretation of the federal laws
- 28 regulating firearm possession and purchase by domestic violence

misdemeanants, Plaintiff BASTASINI would acquire, keep and bear arms for, among other lawful purposes, self-defense in his home.

30. Plaintiff MERCADO:

- a. Plaintiff LOUIE MERCADO plead no contest (and/or guilty) in Sacramento Superior Court to a misdemeanor charge of California Penal Code § 273.5 on December 17, 1990. He was represented by counsel.
 - b. In 1993 the California Legislature amended Penal Code § 12021 and added Penal Code § 273.5 and 242 to the list of misdemeanors which prohibit a person from acquiring/possessing a firearm for 10 years after the date of conviction.
 - c. On September 13, 1994, the Congress passed the Violence Against Women Act, and in 1996 Congress amended the act to impose a lifetime prohibition against the acquisition/possession of firearms by misdemeanants convicted of Domestic Violence. See: 18 U.S.C. §§ 921 and 922 *et seq.*
 - d. On or about December 18, 2001, Plaintiff MERCADO petitioned the Court for relief under Penal Code § 1203.4.
 - e. On January 18, 2002, the Superior Court of Sacramento granted Plaintiff MERCADO's relief under Penal Code § 1203.4. Plaintiff's plea was withdrawn, a plea of not guilty was entered and the court dismissed the case.
 - f. Subsequent to California's restoration of his right to "keep and bear arms" under the California law, Plaintiff MERCADO obtained a firearm permit from the California Bureau of Security and Investigative Services.
 - g. On or about May 1, 2006, Plaintiff MERCADO was informed that his Firearm Permit was being revoked under the lifetime prohibition

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imposed by federal law for his conviction on December 17, 1990.

- h. On July 12, 2011, Plaintiff MERCADO applied for a firearm purchase at federally licensed firearm dealer. Plaintiff correctly filled out the ATF Form 4473 (5300.9) and truthfully answered "YES" to question 11.i.
- i. On July 12, 2011, Plaintiff MERCADO was denied a firearm purchase. Upon making an inquiry to the dealer, Plaintiff was informed that answering "YES" to question 11.i., on ATF form 4473 (5300.9) required the dealer to stop the transaction and deny the purchase.
- j. As of August 29, 2011, Plaintiff MERCADO is permitted to acquire and possess firearms under the laws of the State of California.
- k. As of August 29, 2011, Plaintiff MERCADO is prohibited from acquiring and possessing firearms due to threat of criminal prosecution under federal law.
- l. But for Defendants' wrongful interpretation of the federal laws regulating firearm possession and purchase by domestic violence misdemeanants, Plaintiff MERCADO would acquire, keep and bear arms for, among other lawful purposes, self-defense in his home.

31. Plaintiff GROVES:

- a. Plaintiff WALTER GROVES plead no contest (and/or guilty) in a Monterey County Superior Court to a misdemeanor charge of California Penal Code § 273.5 on January 12, 1990. He was represented by counsel.
- b. In 1993 the California Legislature amended Penal Code § 12021 and added Penal Code § 273.5 and 242 to the list of misdemeanors which prohibit a person from acquiring/possessing a firearm for 10 years after the date of conviction.
- c. On September 13, 1994, the Congress passed the Violence Against

1 Women Act, and in 1996 Congress amended the act to impose a lifetime
2 prohibition against the acquisition/possession of firearms by
3 misdemeanants convicted of Domestic Violence. See: 18 U.S.C. §§ 921
4 and 922 *et seq.*

- 5 d. On or about January 27, 1999, Plaintiff GROVES petitioned the Court
6 for relief under Penal Code § 1203.4.
- 7 e. On April 22, 1999 the Superior Court of Monterey County granted
8 Plaintiff GROVES' relief under Penal Code § 1203.4. Plaintiff's plea was
9 withdrawn, a plea of not guilty was entered and the court dismissed the
10 case.
- 11 f. On or about September 26, 2005, Plaintiff GROVES was denied a
12 firearm purchase. He was informed that federal law prohibited
13 California from clearing his firearm purchase.
- 14 g. On or about July 18, 2011, Plaintiff GROVES again attempted to
15 purchase a firearm, but the federally licensed firearms dealer refused to
16 complete the application process because he truthfully answered "YES"
17 to question 11.i., of the ATF Form 4473 (5300.9).
- 18 h. As of August 29, 2011, Plaintiff GROVES is permitted to acquire and
19 possess firearms under the laws of the State of California.
- 20 i. As of August 29, 2011, Plaintiff GROVES is prohibited from acquiring
21 and possessing firearms due to threat of criminal prosecution under
22 federal law.
- 23 j. But for Defendants' wrongful interpretation of the federal laws
24 regulating firearm possession and purchase by domestic violence
25 misdemeanants, Plaintiff GROVES would acquire, keep and bear arms
26 for, among other lawful purposes, self-defense in his home.

27 32. Plaintiff MONTEIRO:

- 28 a. Plaintiff MANUEL MONTEIRO plead no contest (and/or guilty) in

- 1 Santa Clara County Superior Court to a misdemeanor charge of
2 California Penal Code § 273.5 on May 27, 1992.
- 3 b. In 1993 the California Legislature amended Penal Code § 12021 and
4 added Penal Code § 273.5 to the list of misdemeanors which prohibit a
5 person from acquiring/possessing a firearm for 10 years after the date of
6 conviction.
- 7 c. On September 13, 1994, Congress passed the Violence Against Women
8 Act, and in 1996 Congress amended the act to impose a lifetime ban on
9 the acquisition/possession of firearms by misdemeanants convicted of
10 Domestic Violence. 18 U.S.C. §§ 921 and 922 *et seq.*
- 11 d. On or about September 1, 1995 Plaintiff MONTEIRO requested relief
12 under Penal Code § 1203.4.
- 13 e. On October 3, 1995 the Superior Court of Santa Clara County granted
14 Plaintiff MONTEIRO's relief under Penal Code § 1203.4. Plaintiff's
15 plea was withdrawn, a plea of not guilty was entered and the court
16 dismissed the case.
- 17 f. On or about July 14, 2011, Plaintiff MONTEIRO was denied a firearm
18 purchase. In a letter of explanation from the California Department of
19 Justice, Plaintiff was informed that the denial was based on the Federal
20 Brady Act.
- 21 g. As of August 29, 2011, Plaintiff , MONTEIRO is permitted to acquire
22 and possess firearms under the laws of the State of California.
- 23 h. As of August 29, 2011, Plaintiff MONTEIRO is prohibited from
24 acquiring and possessing firearms due to threat of criminal prosecution
25 under federal law.
- 26 i. But for Defendants' wrongful interpretation of the federal laws
27 regulating firearm possession and purchase by domestic violence
28 misdemeanants, Plaintiff MONTEIRO would acquire, keep and bear

1 arms for, among other lawful purposes, self-defense in his home.

2 33. Plaintiff EDWARD ERIKSON:

- 3 a. On June 3, 1996, Plaintiff ERICKSON plead no contest and/or guilty in
4 a Santa Clara County Superior Court to a misdemeanor charge of
5 Penal Code § 273.5.
6 b. On October 25, 2006, ERICKSON was granted a petition under Penal
7 Code § 1203.4. His plea was withdrawn, a plea of not guilty was entered
8 and the court dismissed the case.
9 c. On or about July 19, 2011, ERICKSON was denied a firearm purchase
10 when the dealer refused to process his application for a transfer due to
11 his truthful answer of “YES” to question 11.i., on the ATF Form 4473
12 (5300.9)
13 d. As of August 29, 2011, Plaintiff ,ERICKSON is permitted to acquire
14 and possess firearms under the laws of the State of California.
15 e. As of August 29, 2011, Plaintiff ERICKSON is prohibited from
16 acquiring and possessing firearms due to threat of criminal prosecution
17 under federal law.
18 f. But for Defendants' wrongful interpretation of the federal laws
19 regulating firearm possession and purchase by domestic violence
20 misdemeanants, Plaintiff ERICKSON would acquire, keep and bear
21 arms for, among other lawful purposes, self-defense in his home.

22 34. Plaintiff VERNON NEWMAN:

- 23 a. On September 17, 1998, NEWMAN plead guilty and/or no contest in a
24 Santa Clara Superior Court to a misdemeanor charge of Penal Code §
25 243(e).
26 b. On July 17, 2008, the Superior Court granted NEWMAN's petition
27 under Penal Code § 1203.4. His plea was withdrawn, a plea of not guilty
28 was entered and the court dismissed the case.

- c. On or about August 1, 2011 NEWMAN was denied a firearm purchase by the California Department of Justice after truthfully answering "YES" to question 11.i., on ATF Form 4473 (5300.9).
 - d. As of August 29, 2011, Plaintiff NEWMAN is permitted to acquire and possess firearms under the laws of the State of California.
 - e. As of August 29, 2011, Plaintiff NEWMAN is prohibited from acquiring and possessing firearms due to a threat of criminal prosecution under federal law.
 - f. But for Defendants' wrongful interpretation of the federal laws regulating firearm possession and purchase by domestic violence misdemeanants, Plaintiff NEWMAN would acquire, keep and bear arms for, among other lawful purposes, self-defense in their homes.

FIRST CLAIM - Declaratory Relief

- 15 35. Paragraphs 1 through 34 are incorporated by reference as if fully set forth
16 herein.

17 36. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiff RICHARD ENOS has not been
18 convicted of a crime of domestic violence under any one of three possible
19 theories:

20 a. RICHARD ENOS was not apprized of the possibility of losing his
21 firearm rights when he plead no contest to a misdemeanor crime of
22 Domestic Violence back in 1991, as there was no federal or state law
23 prohibiting Domestic Violence misdemeanants from
24 acquiring/possessing firearms upon conviction. Therefore he could not
25 make a knowing/intelligent waiver of his right to a trial.

26 b. RICHARD ENOS applied for and was granted a restoration of his
27 rights under California Penal Code § 12021(c)(3) by a Superior Court
28 Judge in Santa Clara County California.

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- 1 c. And finally, the State of California restores the right to possess firearms
2 for Domestic Violence misdemeanants 10 years after conviction, by
3 operation of law.
- 4 37. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive
5 Plaintiff RICHARD ENOS of the “right to keep and bear arms” he would
6 otherwise enjoy if the Defendants correctly applied the law.

7

8 **SECOND CLAIM – Declaratory Relief**

- 9 38. Paragraphs 1 through 34 are incorporated by reference as if fully set forth
10 herein.
- 11 39. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiffs JEFF BASTASINI, LOUIE
12 MERCADO, WALTER GROVES and MANUEL MONTEIRO have not been
13 convicted of a crime of domestic violence under any one of two possible
14 theories:
- 15 a. JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES and
16 MANUEL MONTEIRO were not apprized of the possibility of losing
17 their firearm rights when they plead no contest to a misdemeanor crime
18 of Domestic Violence as there was no federal or state law prohibiting
19 Domestic Violence misdemeanants from acquiring/possessing firearms
20 upon conviction. Therefore they could not make a knowing/intelligent
21 waiver of their right to a trial.
- 22 b. And, the State of California restores the right to possess firearms for
23 Domestic Violence misdemeanants 10 years after conviction, by
24 operation of law.
- 25 40. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive
26 Plaintiffs JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES and
27 MANUEL MONTEIRO of the “right to keep and bear arms” they would
28 otherwise enjoy if the Defendants correctly applied the law.

THIRD CLAIM – Declaratory Relief

- 2 41. Paragraphs 1 through 34 are incorporated by reference as if fully set forth
3 herein.

4 42. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiffs EDWARD ERIKSON and
5 VERNON NEWMAN have not been convicted of a crime of domestic violence
6 because California restores the right to possess firearms for Domestic Violence
7 misdemeanants 10 years after conviction, by operation of law.

8 43. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive
9 Plaintiffs EDWARD ERIKSON and VERNON NEWMAN of the “right to keep
10 and bear arms” they would otherwise enjoy if the Defendants correctly applied
11 the law.

FOURTH CLAIM – Second Amendment

14. Paragraphs 1 through 43 are incorporated by reference as if fully set forth
15 herein.

16. The Second Amendment to the United States Constitution provides in part
17 that: *“the right of the people to keep and bear Arms shall not be infringed.”*

18. On its face, 18 U.S.C. §§ 921(a)(33), 922(d)(9) and 922(g)(9) violates the
19 Plaintiffs’ Second Amendment rights because it imposes a lifetime ban on the
20 exercise of a fundamental constitutional “right to keep and bear arms” after
21 conviction of a minor crime.

22. As applied to the facts of this case, the Defendants’ interpretations of 18 U.S.C.
23 §§ 921(a)(33), 922(d)(9) and 922(g)(9) violates the Plaintiffs’ Second
24 Amendment rights because it imposes a lifetime ban on the exercise of a
25 fundamental constitutional “right to keep and bear arms” after conviction of a
26 minor crime.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that this Court will enter judgment as follows:

- A. Declaratory and injunctive relief that all Plaintiffs are not subject to the prohibitions set forth in 18 U.S.C. §§ 922(d)(9) and 922(g)(9).
 - B. Declaratory and injunctive relief that 18 U.S.C. §§ 922(d)(9) and 922(g)(9) are unconstitutional on their face and as applied to all Plaintiffs.
 - C. Award Plaintiffs their reasonable attorney fees and costs under 28 U.S.C. § 2412, 42 U.S.C. § 1988 and/or 18 U.S.C. § 925A.
 - D. Such other and further relief as this Court deems just and proper.

Respectfully Submitted on August 29, 2011,

/s/

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RICHARD ENOS, JEFF BASTASINI,) Case No. 2:10-CV-2911-JAM-EFB
LOUIE MERCADO, WALTER GROVES,)
MANUEL MONTEIRO, EDWARD ERIKSON,) ORDER GRANTING IN PART AND
VERNON NEWMAN, JEFF LOUGHAN and) DENYING IN PART DEFENDANTS'
WILLIAM EDWARDS,) MOTION TO DISMISS
Plaintiffs,
v.
ERIC HOLDER, as United States)
Attorney General, and ROBERT)
MUELLER, III, as Director of the)
Federal Bureau of Investigation,
Defendants.

This matter is before the Court on Defendants' Eric Holder and Robert Mueller, III (collectively "Defendants") Motion to Dismiss (Doc. #11) Plaintiffs' Richard Enos ("Enos"), Jeff Bastasini ("Bastasini"), Louie Mercado ("Mercado"), Walter Groves ("Groves"), Manuel Monteiro ("Monteiro"), Edward Erickson ("Erickson"), Vernon Newman ("Newman"), Jeff Loughran ("Loughran") and William Edwards ("Edwards") First Amended Complaint ("FAC") (Doc. #8). The above-named plaintiffs opposed the motion. A hearing on the motion to dismiss was held on May 4, 2011. At the close of the hearing, the

1 Court dismissed plaintiffs Edwards and Loughran, for improper
2 joinder and venue (Doc. #20) and ordered further briefing on
3 Defendants' supplemental authorities. Having reviewed the
4 additional briefing, and based on the moving papers and oral
5 argument, the Court GRANTS in part and DENIES in part the motion to
6 dismiss.

7

8 I. FACTUAL AND PROCEDURAL BACKGROUND

9 Enos, Bastasini, Mercado, Groves, Monteiro, Erickson, and
10 Newman (collectively "Plaintiffs") have each been convicted of
11 misdemeanor domestic violence in California, and allege that they
12 wish to purchase a gun but are prevented from doing so by federal
13 law. Plaintiffs challenge the government's interpretation of 18
14 U.S.C. § 922(g)(9), which makes it a federal offense for any person
15 who has been convicted of a misdemeanor crime of domestic violence
16 to possess a firearm, and the government's interpretation of 18
17 U.S.C. § 922(d)(9), which makes it unlawful to sell a firearm or
18 ammunition to a person who has been convicted of misdemeanor
19 domestic violence. Though California law allows for the
20 restoration of gun rights after a period of ten years from the
21 misdemeanor domestic violence conviction, (see CA Penal Code
22 § 12021(c)(1) and (3)), the FAC alleges that federal law only
23 provides for the restoration of gun rights for those with felony
24 convictions. Accordingly, Plaintiffs allege that federal law
25 creates a lifetime ban on gun ownership for those with misdemeanor
26 domestic violence convictions.

27 Plaintiffs allege that they were each convicted of misdemeanor
28 domestic violence over ten years ago, and under California law

1 their gun rights have been restored. Accordingly, they argue that
2 the federal law barring them from gun ownership is a violation of
3 their constitutional rights. Plaintiffs allege that 18 U.S.C.
4 § 922(g) (9) and (d) (9) violate their Second, First, Tenth, and
5 Fifth Amendment rights. Plaintiffs also seek declaratory and
6 injunctive relief that they are not subject to the prohibitions set
7 forth in 18 U.S.C. § 922(d) (9) and 922(g) (9) and that these two
8 statutes are unconstitutional on their face and as applied to
9 Plaintiffs. Defendants argue that most of the plaintiffs lack
10 standing to challenge the law, and should be dismissed pursuant to
11 Federal Rules of Civil Procedure 12(b) (1). Defendants further
12 argue that the constitutional claims fail under Federal Rules of
13 Civil Procedure 12(b) (6), for failure to state a claim.

14

15 II. OPINION

16 A. Legal Standard

17 1. Rule 12(b) (1) dismissal

18 A party may move to dismiss an action for lack of subject
19 matter jurisdiction pursuant to Federal Rules of Civil Procedure
20 12(b) (1). When a defendant brings a motion to dismiss for lack of
21 subject matter jurisdiction pursuant to Rule 12(b) (1), the
22 plaintiff has the burden of establishing subject matter
23 jurisdiction. See Rattlesnake Coalition v. United States Envtl.
24 Protection Agency, 509 F.3d 1095, 1102, FN 1 (9th Cir. 2007).

25 2. Rule 12(b) (6) dismissal

26 A party may move to dismiss an action for failure to state a
27 claim upon which relief can be granted pursuant to Federal Rules of
28 Civil Procedure 12(b) (6). In considering a motion to dismiss, the

court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that are mere "legal conclusions," however, are not entitled to the assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a plaintiff needs to plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. Dismissal is appropriate where the plaintiff fails to state a claim supportable by a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

Upon granting a motion to dismiss for failure to state a claim, the court has discretion to allow leave to amend the complaint pursuant to Federal Rules of Civil Procedure 15(a). "Absent prejudice, or a strong showing of any [other relevant] factor[], there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment." Id.

Generally, the court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. There are two exceptions: when material is attached to the complaint or relied on by the complaint, or when the court takes judicial notice of matters of public record, provided the facts are

1 not subject to reasonable dispute. Sherman v. Stryker Corp., 2009
2 WL 2241664 at *2 (C.D. Cal. Mar. 30, 2009) (internal citations
3 omitted). Here, Plaintiffs request judicial notice of ATF Form
4 4473, the form that must be completed when applying to purchase a
5 gun. The Court will take judicial notice of this form, as it is a
6 matter of public record.

7 B. Claims for Relief

8 As threshold matters, Defendants challenge the Court's
9 jurisdiction and Plaintiffs' standing. Defendants argue that the
10 FAC fails to set forth the jurisdictional basis for seeking a
11 declaration from the Court that their convictions are not
12 misdemeanor crimes of domestic violence under 18 U.S.C.
13 § 921(a)(33). Section 921(a)(33) defines a "misdemeanor crime of
14 domestic violence" as

15 a misdemeanor that has as an element, the use or
16 attempted use of physical force, or the threatened use
17 of a deadly weapon, committed by a current or former
18 spouse, parent or guardian of the victim, by a person
19 with whom the victim shares a child in common, by a
person who is cohabiting with or has cohabited with
the victim as a spouse, parent, or guardian, or by a
person similarly situated to a spouse parent, or
guardian of the victim.

20 However, the statute provides that a person shall not be
21 considered to have been convicted of such an offense unless
22 the person was represented by counsel in the case, or
23 knowingly and intelligently waived the right to counsel in
24 the case, and if the prosecution for an offense entitled
25 the person to a jury trial, the case was tried by a jury or
26 the person knowingly and intelligently waived the right to
27 a jury trial, by guilty plea or otherwise. 18 U.S.C.
28 § 921(a)(33)(B)(i).

1 The statute further provides that

2 a person shall not be considered to have been
3 convicted of such an offense for purposes of this
4 chapter if the conviction has been expunged or set
5 aside, or is an offense for which the person has been
6 pardoned or has had civil rights restored (if the law
7 of the applicable jurisdiction provides for the loss
8 of civil rights under such an offense) unless the
9 pardon, expungement, or restoration of civil rights,
10 expressly provides that the person may not ship,
11 transport, posses, or receive firearms.

12 18 U.S.C. § 921(a)(33)(B)(ii).

13 18 U.S.C. § 922(s) and (t) govern the process for acquiring a
14 firearms permit. Under 18 U.S.C. § 925A, any person denied a
15 firearm pursuant to Sections 922(s) or (t), (1) due to the
16 provision of erroneous information by any state or political
17 subdivisions thereof, or by the National Instant Criminal
18 Background Check System established under Section 103 of the Brady
19 Handgun Violence Prevention Act; or (2) who was not prohibited from
20 receipt of a firearm pursuant to subsection (g) or (n) of Section
21 922, may bring an action against the State or political subdivision
22 responsible for providing the erroneous information, or responsible
23 for denying the transfer, or against the United States, as the case
24 may be, for an order directing that the erroneous information be
25 corrected or that the transfer be approved, as the case may be.

26 To the extent that Plaintiffs rely on 18 U.S.C. § 925A as the
27 jurisdictional basis for the requested declaratory relief,
28 Defendants argue that the statute would only apply to Enos, as he
 is the only plaintiff that the FAC alleges actually attempted to
 purchase a gun and was denied due to the National Instant Criminal
 Background Check System, maintained by the Department of Justice
 and the Federal Bureau of Investigation. The Declaratory Judgment

1 Act, 28 USC 2201-02, on its own does not confer federal
2 jurisdiction. See Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d
3 1158, 1161 (9th Cir. 2005).

4 At oral argument, counsel for Plaintiffs stated that Enos was
5 not the only plaintiff to attempt to purchase a gun, and said he
6 would present further evidence at summary judgment. However, the
7 FAC is devoid of any such allegations pertaining to the other
8 plaintiffs. Without allegations that the other plaintiffs
9 attempted to purchase a gun and were denied a permit pursuant to
10 Sections 922(s) or (t), this Court lacks jurisdiction over their
11 claims for declaratory relief under 18 U.S.C. § 925A. No other
12 jurisdictional basis was alleged in the FAC. Accordingly the
13 declaratory relief claims brought by plaintiffs Bastasini, Mercado,
14 Groves, Monteiro, Erickson, and Newman are DISMISSED, WITH LEAVE TO
15 AMEND.

16 Defendants argue that while the Court may have jurisdiction
17 over Enos' claim for declaratory relief, the claim is without
18 merit. The FAC alleges that because Enos may possess a gun without
19 running afoul of CA Penal Code § 1201(c)(1), his civil rights have
20 been restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii).
21 Defendants argue that the language in the statute "civil rights
22 restored" denotes rights accorded to an individual by virtue of his
23 citizenship in a particular state, comprising the right to vote,
24 hold public office, and serve on a jury. See Metzger v. United
25 States, 3, F.3d 756, 758 (4th Cir. 1993); McGrath v. United States,
26 60 F.3d 1005 (2d Cir. 1995); United States v. Cassidy, 899 F.2d
27 543, 549 (6th Cir.). According to Defendants, because none of
28 these rights were taken away from Enos due to his misdemeanor

1 conviction, none could be restored.

2 Enos argues that his civil right to possess a gun was taken
3 away by the state of California, and restored after ten years.
4 Though the Ninth Circuit has previously rejected the argument that
5 a state's restoration of an individual's right to possess firearms
6 constitutes a "restoration of rights" under 18 U.S.C. §
7 921(a)(33)(B)(ii), in U.S. v. Brailey, 408 F.3d 609 (9th Cir.
8 2005), Enos contends that Brailey and additional cases raised by
9 Defendants should not be followed since they were decided before
10 the Supreme Court's rulings in District of Columbia v. Heller, 554
11 U.S. 570 (2008) (holding that the Second Amendment confers an
12 individual right to keep and bear arms), and McDonald v. City of
13 Chicago, 130 S.Ct. 3020 (2010) (holding that the Fourteenth
14 Amendment incorporates the Second Amendment right). Accordingly,
15 Enos may be able to maintain a claim for declaratory relief in
16 light of the shifting legal landscape after Heller and McDonald.

17 Even if the Court were to find that a civil right was
18 restored, Defendants argue that the statute is written in the
19 plural and only contemplates the restorations of "rights" not the
20 restoration of one right. Enos in turn asserts that the Second
21 Amendment protects multiple rights, the right to keep and the right
22 to bear, firearms.

23 At this early stage of the pleadings, taking the allegations
24 of the FAC as true, the Court finds that the FAC contains
25 sufficient allegations to maintain Enos' claim for declaratory
relief. Accordingly the motion to dismiss Enos' declaratory relief
claim is DENIED.

28 Next, Defendants contest Plaintiffs' standing to challenge the

1 constitutionality of the federal statutes at issue, arguing that
2 Plaintiffs, with the possible exception of Enos, lack standing to
3 challenge the constitutionality of 18 U.S.C. § 921(a)(33),
4 § 922(d)(9) and § 922(g)(9).

5 Article III of the United States Constitution limits the
6 jurisdiction of federal court to cases and controversies. See San
7 Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir.
8 1996). Federal courts are presumed to lack jurisdiction, unless
9 the contrary appears affirmatively from the record. Id. Standing
10 is an essential, core component of the case or controversy
11 requirement. Id. (citing Lujan v. Defenders of Wildlife, 504 U.S.
12 555, 560 (1992)). Plaintiffs, as the parties invoking federal
13 jurisdiction, bear the burden of establishing their standing to
14 sue. Id. To do so, they must demonstrate that they have suffered
15 "an 'injury in fact' to a legally protected interest that is both
16 'concrete and particularized' and 'actual or imminent,' as opposed
17 to "conjectural" or "hypothetical." Id.

18 The plaintiffs, other than Enos, lack standing for the same
19 reasons as those discussed above in relation to the Court's
20 jurisdiction. Without allegations in the FAC that Plaintiffs have
21 attempted to purchase a gun and have been denied, or that they face
22 imminent prosecution for possessing a gun, Plaintiffs lack
23 standing. They have not alleged a concrete injury or an imminent
24 threat of prosecution, as FAC merely alleges that Plaintiffs wish
25 to purchase guns. The FAC lacks allegations that 18 U.S.C.
26 § 921(a)(33), § 922(d)(9) and § 922(g)(9) have been applied to
27 Plaintiffs. Accordingly, the Court finds that only Enos has
28 standing to challenge the constitutionality of the aforementioned

1 statutes, and the other plaintiffs claims are dismissed without
2 prejudice.

3 1. Second Amendment

4 The FAC alleges that 18 U.S.C. §§ 921(a)(33), 922(d)(9), and
5 922(g)(9) violate Enos' Second Amendment right to keep and bear
6 arms because together they impose a lifetime ban on gun ownership
7 after a domestic violence misdemeanor conviction. Defendants argue
8 that the FAC fails to state a claim for a Second Amendment
9 violation, because statutes prohibiting felons or misdemeanants
10 from possessing firearms have been found lawful under the Second
11 Amendment. See, e.g., United States v. Vongxay, 594 F.3d 1111 (9th
12 Cir. 2010) (holding that 18 U.S.C. § 922(g)(1), statute prohibiting
13 felons from possessing firearms, did not violate the Second
14 Amendment); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010)
15 (holding that 18 U.S.C. 922(g) is generally proper under the Second
16 Amendment); United States v. Booker, 2011 WL 1631947 (1st Cir.
17 2011) (holding that 18 U.S.C. § 922(g)(9) is a presumptively lawful
18 regulatory measure); United States v. White, 593 F.3d 1199 (11th
19 Cir. 2010) (same). Enos distinguishes his claim from Vongxay,
20 Skoien, Booker, and White in that he seeks to challenge 18 U.S.C.
21 § 922(g)(9) (and 18 U.S.C. § 922(d)(9) and 18 U.S.C.
22 § 921(a)(33)) only to the extent that they impose a lifetime ban on
23 the right to own a gun without possibility of restoring the right,
24 despite restoration of this right in California. Enos does not
25 challenge the 18 U.S.C. § 922(g)(9)'s constitutionality insofar as
26 it restricts his gun ownership for ten years following his
27 misdemeanor domestic violence conviction.

28 The First Circuit recently held in Booker, 2011 WL 1631947

1 that section 922(g)(9) "fits comfortably among the categories of
2 regulations that Heller suggested would be presumptively lawful."
3 Id. at *10. The First Circuit rejected Booker's arguments that
4 section 922(g)(9) violates the Second Amendment, finding that there
5 is a substantial relationship between section 922(g)(9)'s
6 disqualification of domestic violence misdemeanants from gun
7 ownership and the governmental interest in preventing gun violence
8 in the home. Id. at *11.

9 Though the First Circuit found section 922(g)(9) to be
10 facially valid, Enos in his supplemental briefing urges the Court
11 not to dismiss his Second Amendment claim at this stage, arguing
12 that he brings an as-applied challenge. He only argues section
13 922(g)(9) is unconstitutional to the extent that it is interpreted,
14 along with section 921(a)(33)(B)(ii) as a lifetime ban on gun
15 ownership without the possibility of restoring gun rights. Based
16 on the pleadings and oral argument, the Court will not dismiss
17 Enos' Second Amendment claim at this stage, as he may be able to
18 maintain a claim. Accordingly, the motion to dismiss Enos' Second
19 Amendment claim is DENIED.

20 2. First Amendment

21 The FAC alleges that 18 U.S.C. § 922(g)(9), 18 U.S.C.
22 § 922(d)(9) and 18 U.S.C. § 921 (a)(33) violate Enos' First
23 Amendment rights, because they impose a lifetime ban on the
24 exercise of a fundamental constitutional right for a minor crime
25 without providing a statutory remedy to petition the government for
26 restoration of that right. However, as Defendants argue, these
27 allegations fail to state a claim. Defendants contend that the
28 First Amendment claim is devoid of merit, because it contains no

1 allegations that the government has restricted Plaintiffs right to
2 speech and to petition the government for redress. Furthermore, gun
3 possession is not speech. See Nordyke v. King 319 F.3d 1185, 1190
4 (9th Cir. 2003). Plaintiffs conceded the weakness of this claim in
5 the briefs and at oral argument, by admitting that they advanced
6 the claim only in hopes of making new law. However, Enos has
7 failed to state a claim for violation of the First Amendment, and
8 his First Amendment claim is DISMISSED, WITH PREJUDICE.

9 3. Tenth Amendment

10 The FAC alleges that 18 U.S.C. § 922(g)(9) 18 U.S.C.
11 § 922(d)(9) and 18 U.S.C. § 921 (a)(33) violate the Tenth
12 Amendment, by usurping the States' powers to define and provide for
13 the rehabilitation of minor public offenses.¹ Defendants move to
14 dismiss the Tenth Amendment claim, arguing that the Ninth Circuit
15 in United States v. Andaverde, 64 F.3d 1305 (9th Cir. 1995) held
16 that Congress may regulate possession of firearms without violating
17 the Tenth Amendment. Though Andaverde discussed 18 U.S.C.
18 § 922(g)(1) (regulating the possession of firearms by felons),
19 courts addressing 18 U.S.C. § 922(g)(9) have likewise found the
20 statute to be constitutional under the Tenth Amendment. See, e.g.,
21 Fraternal Order of Police v. United States, 173 F. 3d 898 (D.C.
22 Cir. 1999); Hiley v. Barret, 155 F.3d 1276 (11th Cir. 1998).
23 Accordingly, Enos' claim for violation of the Tenth Amendment is

24 _____
25 ¹ The Court has considered Bond v. United States, 2011 WL 2369334
26 (2011), the supplemental authority recently submitted by counsel
27 for Plaintiffs (Doc. #23), and finds it unpersuasive. Bond is
28 unrelated to the issue of firearms regulation under the Tenth
Amendment, and to the extent that Plaintiffs' cite it in support of
their argument for standing, it is entirely distinguishable from
the case at hand, because the plaintiff in Bond was convicted and
incarcerated under the law she challenged on Tenth Amendment
grounds.

1 DISMISSED, WITH PREJUDICE.

2 4. Fifth Amendment

3 The FAC alleges that 18 U.S.C. § 922(g)(9), 18 U.S.C.
4 § 922(d)(9) and 18 U.S.C. § 921(a)(33) violate the Fifth Amendment
5 by imposing a lifetime ban on the right to own a gun without
6 providing a statutory remedy for restoration of that right.

7 Defendants' oppose this claim, arguing that 18 U.S.C. § 925(c)
8 allows any person to apply for relief from the Attorney General.

9 See Palma v. United States, 228 F.3d 323, 327-28 (3d Cir. 2000)
10 (stating that persons convicted of a misdemeanor crime of domestic
11 violence may apply for relief under 18 U.S.C. § 925(c)). Enos'
12 opposition brief states that he is asserting an equal protection
13 argument, but does not set forth allegations or argument in support
14 of this claim or in opposition to Defendants' arguments.

15 Accordingly, the Fifth Amendment claim is DISMISSED, WITH
16 PREJUDICE.

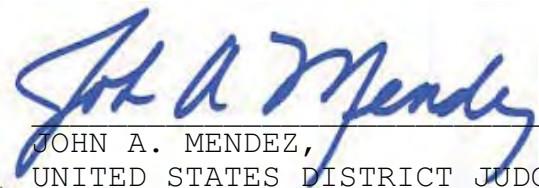
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18 III. ORDER

19 For the reasons set forth above, Defendants' motion to dismiss
20 the FAC is GRANTED in part and DENIED in part. Bastasini's,
21 Mercado's, Groves', Monteiro's, Erickson's, and Newman's
22 declaratory relief and constitutional claims are dismissed, with
23 leave to amend.² Enos' First Amendment, Tenth Amendment and Fifth

24
25 ² Because the Court found that as pled, Bastasini, Mercado, Groves,
26 Monteiro, Erickson, and Newman lack standing to plead the
27 constitutional claims, the Court only reached the merits of Enos'
28 constitutional claims, and dismissed the remaining Plaintiffs'
constitutional claims. However, remaining plaintiffs are advised
that the Court will look with disfavor on any attempt to re-plead
the First, Tenth and Fifth Amendment claims that were dismissed
with prejudice as to Enos.

1 Amendment claims are dismissed, with prejudice. The motion to
2 dismiss is denied as to dismissal of Enos' declaratory relief and
3 Second Amendment claims. Plaintiffs must file a Second Amended
4 Complaint within twenty (20) days of the date of this order.

5
6 IT IS SO ORDERED.
7 Dated: July 7, 2011


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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8

9

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 RICHARD ENOS, JEFF BASTASINI,
12 LOUIE MERCADO, WALTER GROVES,
13 MANUEL MONTEIRO, EDWARD
14 ERIKSON, VERNON NEWMAN, JEFF
15 LOUGHREN and WILLIAM EDWARDS,

16 Plaintiffs,

17 vs.

18 ERIC HOLDER, as United States Attorney
19 General, and ROBERT MUELLER, III, as
20 Director of the Federal Bureau of
Investigation,

Defendants.

CASE NO.: 2:10-CV-02911-JAM-EFB

FIRST AMENDED COMPLAINT
AND REQUEST FOR
INJUNCTIVE/DECLARATORY RELIEF

VIOLATIONS OF THE FIRST, SECOND,
FIFTH, and TENTH AMENDMENTS OF
THE UNITED STATES CONSTITUTION

18 U.S.C. § 921 *et seq.*

18 U.S.C. § 922 *et seq.*

18 U.S.C. § 925A

28 U.S.C. § 2412

42 U.S.C. § 1988

21

22 **PARTIES**

- 23 1. Plaintiff RICHARD ENOS, is an individual who is a citizen/resident of the State of
24 California. ENOS lives in San Joaquin County.
- 25 2. Plaintiff JEFF BASTASINI, is an individual who is a citizen/resident of the State of
26 California.
- 27 3. Plaintiff LOUIE MERCADO, is an individual who is a citizen/resident of the State of
28 California.

1 4. Plaintiff WALTER GROVES, is an individual who is a citizen/resident of the State of
2 California.
3 5. Plaintiff MANUEL MONTEIRO, is an individual who is a citizen/resident of the State of
4 California.
5 6. Plaintiff EDWARD ERIKSON, is an individual who is a citizen/resident of the State of
6 California.
7 7. Plaintiff VERNON NEWMAN, is an individual who is a citizen/resident of the State of
8 California.
9 8. Plaintiff JEFF LOUGHRAN, is an individual who is a citizen/resident of the State of
10 North Dakota.
11 9. Plaintiff WILLIAM EDWARDS, is an individual who is a citizen/resident of the State of
12 California.
13 10. Defendant ERIC HOLDER is the United States Attorney General and is charged with
14 interpretation and enforcement of 18 U.S.C. §§ 921 *et seq.* and 922 *et seq.*
15 11. Defendant ROBERT MUELLER, III is the Director of the Federal Bureau of
16 Investigation and is charged with interpretation and enforcement of 18 U.S.C. §§ 921 *et*
17 *seq.* and 922 *et seq.*

JURISDICTION AND VENUE

19 12. This Court has jurisdiction over the lawsuit because the action arises under 18 U.S.C. §§
20 921 *et seq.*, 922 *et seq.* and 925A.
21 13. As this action arises under the United States Constitution this Court also has jurisdiction
22 pursuant to 28 U.S.C. § 1331.
23 14. As the Plaintiffs are seeking declaratory relief, this Court has jurisdiction over this action
24 pursuant to 28 U.S.C. §§ 2201 and 2202.
25 15. Venue for this action is properly in this District pursuant to 28 U.S.C. § 1391.
26 16. All conditions precedent, including exhaustion of administrative remedies where
27 required, have been performed, have occurred, are futile or unnecessary where the
28 government infringes on a fundamental right.

FACTS

17. The State of California works in conjunction with the Federal Government to interpret statutes and implementing regulations that restrict the “right to keep and bear arms” of people convicted of Misdemeanor Crimes of Domestic Violence.

18. The Federal Government’s definition of Misdemeanor Crimes of Domestic Violence is found at 18 U.S.C. § 921(a)(33):

(33) (A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that--

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B) (i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USCS §§ 921 et seq.], unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USCS §§ 921 et seq.] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

1111

- 1 19. It is federal criminal offense for any person to sell or otherwise dispose of any firearm to
2 a person who has been convicted of a Misdemeanor Crime of Domestic Violence. 18
3 U.S.C. § 922(d)(9).
- 4 20. It is federal criminal offense for any person who has been convicted of a Misdemeanor
5 Crime of Domestic Violence to possess a firearm. 18 U.S.C. § 922(g)(9).
- 6 21. Thus Federal Law imposes a lifetime ban on the “right to keep and bear arms” for persons
7 convicted of Misdemeanor Crimes of Domestic Violence, subject to the individual states’
8 power to restore this fundamental civil right under state law.
- 9 22. Federal Law also provides a means for felons to have their “right to keep and bear arms”
10 restored under procedures promulgated and implemented by the Attorney General. 18
11 U.S.C. § 925(c).
- 12 23. California Penal Code § 12021(c)(1) sets forth a list of specific crimes that subject a
13 person convicted of certain misdemeanors to a ten (10) year prohibition against owning,
14 possessing and purchasing firearms (and ammunition). This list includes, but is not
15 limited to the following Misdemeanor Crimes of Domestic Violence:
- 16 a. Battery Against a Spouse/Cohabitant. CA Penal Code § 243(e).
- 17 b. Corporal Injury to Spouse/Cohabitant. CA Penal Code § 273.5.
- 18 24. Pursuant to Penal Code § 12021(c)(1), the State of California has clearly and
19 unequivocally set forth a policy of limiting firearms prohibitions, for persons convicted of
20 Misdemeanor Crimes of Domestic Violence, to a ten (10) year period such that by the
21 passage of time the misdemeanants’ “right to keep and bear arms” is restored, without
22 qualification, by operation of law.
- 23 25. California Penal Code § 12021(c)(3) also provides the means for a person convicted of a
24 Misdemeanor Crime of Domestic Violence, prior to the date the state law went into
25 effect, to have a Superior Court Judge restore the fundamental “right to keep and bear
26 arms” on a case by case basis.
- 27 26. Even though The State of California has a policy of restoring the “right to keep and bear
28 arms” through a hearing process and by operation of law (through the passage of time),

- 1 the Federal Government refuses to recognize California's restoration of rights and
2 rehabilitation policies.
- 3 27. As a direct consequence of the Federal Government's refusal to recognize California's
4 restoration and rehabilitation policies Plaintiffs herein (and all other persons similarly
5 situated) continue to be subject to a lifetime prohibition of the "right to keep and bear
6 arms" under Federal Law.
- 7 28. This interpretation of the law by the Federal Government results in five (5) wrongful and
8 unconstitutional consequences:
- 9 a. Plaintiffs (and all other persons similarly situated) are subject to federal criminal
10 prosecution if they attempt to exercise their fundamental "right to keep and bear
11 arms" after the State of California has restored their rights.
- 12 b. Plaintiffs (and all other persons similarly situated) cannot lawfully purchase a
13 firearm to exercise their fundamental "right to keep and bear arms" because they
14 cannot pass the background check required by state and federal law.
- 15 c. Plaintiffs (and all other persons similarly situated) are denied a federal statutory
16 remedy to restore their "right to keep and bear arms" resulting in a denial of their
17 right to petition their government for redress of grievances.
- 18 d. Plaintiffs, as misdemeanants, (and all other persons similarly situated) are denied
19 a federal statutory remedy to restore their "right to keep and bear arms" even as
20 convicted felons have a statutory right to restore their rights under 18 U.S.C. §
21 925(c), thus resulting in a *de jure* denial of equal protection of the law.
- 22 e. The federal government has usurped the power retained by the State of California,
23 and the people, for defining a misdemeanor crime of domestic violence and
24 defining the procedures for restoration of the "right to keep and bear arms"
25 following a conviction for a misdemeanor crime of domestic violence.
- 26 29. Plaintiff ENOS:
27 a. On or about July 15, 1991, Plaintiff RICHARD ENOS plead *nolo contendere* and
28 was convicted of a misdemeanor violation of California Penal Code § 273.5 (a).

- 1 b. In 1993 the California Legislature amended Penal Code § 12021 and added Penal
2 Code § 273.5 to the list of misdemeanors which prohibit a person from
3 acquiring/possessing a firearm for 10 years after the date of conviction.
4 c. On September 13, 1994, the Congress passed the Violence Against Women Act,
5 and in 1996 Congress amended the act to impose a lifetime prohibition against the
6 acquisition/possession of firearms by misdemeanants convicted of Domestic
7 Violence. See: 18 U.S.C. §§ 921 and 922 *et seq.*
8 d. In March of 1999, Plaintiff RICHARD ENOS, petitioned for a record clearance
9 under Penal Code § 1203.4.
10 e. On May 25, 1999, Plaintiff RICHARD ENOS's petition was granted by the
11 Honorable Ray E. Cunningham, Superior Court Judge. Plaintiff's plea of guilty
12 was withdrawn, a plea of not guilty was entered and the court dismissed the case.
13 f. On May 12, 2000, Plaintiff RICHARD ENOS filed a PETITION FOR
14 RESTORATION OF CIVIL RIGHTS (FIREARM POSSESSION).
15 g. On Jun 16, 2000, the PETITION FOR RESTORATION OF CIVIL RIGHTS
16 (FIREARM POSSESSION) was granted by the Honorable Thang N. Barrett.
17 h. In February of 2001, Plaintiff RICHARD ENOS caused a letter to be sent to the
18 California Department of Justice referencing the order by Judge Barrett restoring
19 his rights. At that point in time the State of California had cleared RICHARD
20 ENOS to own/possess firearms.
21 i. In August of 2004, Plaintiff RICHARD ENOS was denied a firearm purchase and
22 advised by the State of California that the denial was being maintained by U.S.
23 Department of Justice, Federal Bureau of Investigation, National Instant Criminal
24 Background Check System.
25 j. As of October 25, 2010, Plaintiff RICHARD ENOS is permitted to acquire and
26 possess firearms under the laws of the State of California.
27 k. As of October 25, 2010, Plaintiff RICHARD ENOS is prohibited from acquiring
28 and possessing firearms due to threat of criminal prosecution under federal law.

- 1 1. But for Defendants' wrongful interpretation of the federal laws regulating firearm
2 possession and purchase by domestic violence misdemeanants, Plaintiff
3 RICHARD ENOS would acquire, keep and bear arms for, among other lawful
4 purposes, self-defense in his home.
- 5 30. Plaintiffs BASTASINI, MERCADO, GROVES and MONTEIRO:
6 a. Plead or were convicted of misdemeanors under California Penal Code § 273.5.
7 i. Plaintiff BASTASINI plead no contest (and/or guilty) to a misdemeanor
8 charge of California Penal Code § 273.5 on March 25, 1991. He was not
9 represented by counsel.
10 ii. Plaintiff LOUIE MERCADO plead no contest (and/or guilty) to a
11 misdemeanor charge of California Penal Code § 273.5 on December 17,
12 1990. He was represented by counsel.
13 iii. Plaintiff WALTER GROVES plead no contest (and/or guilty) to a
14 misdemeanor charge of California Penal Code § 273.5 on January 12,
15 1990. He was represented by counsel.
16 iv. Plaintiff MANUEL MONTEIRO plead no contest (and/or guilty) to a
17 misdemeanor charge of California Penal Code § 273.5 on May 27, 1992.
18 b. In 1993 the California Legislature amended Penal Code § 12021 and added Penal
19 Code § 273.5 to the list of misdemeanors which prohibit a person from
20 acquiring/possessing a firearm for 10 years after the date of conviction.
21 c. On September 13, 1994, Congress passed the Violence Against Women Act, and
22 in 1996 Congress amended the act to impose a lifetime ban on the
23 acquisition/possession of firearms by misdemeanants convicted of Domestic
24 Violence. 18 U.S.C. §§ 921 and 922 *et seq.*
25 d. Plaintiffs JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES and
26 MANUEL MONTEIRO have not availed themselves of the relief provisions
27 under California Penal Code § 12021(c)(3) as this would be a futile act based
28 upon the passage of ten (10) years and upon the Federal Government's current

- 1 interpretation of 18 U.S.C. §§ 921 and 922 *et seq.*
- 2 e. Plaintiffs JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES and
- 3 MANUEL MONTEIRO have availed themselves of the provisions of California
- 4 Penal Code § 1203.4. Their petitions were granted.
- 5 f. As of October 25, 2010, Plaintiffs JEFF BASTASINI, LOUIE MERCADO,
- 6 WALTER GROVES and MANUEL MONTEIRO are permitted to acquire and
- 7 possess firearms under the laws of the State of California.
- 8 g. As of October 25, 2010, Plaintiffs JEFF BASTASINI, LOUIE MERCADO,
- 9 WALTER GROVES and MANUEL MONTEIRO are prohibited from acquiring
- 10 and possessing firearms due to a credible threat of criminal prosecution under
- 11 federal law.
- 12 h. But for Defendants' wrongful interpretation of the federal laws regulating firearm
- 13 possession and purchase by domestic violence misdemeanants, Plaintiffs JEFF
- 14 BASTASINI, LOUIE MERCADO, WALTER GROVES and MANUEL
- 15 MONTEIRO would acquire, keep and bear arms for, among other lawful
- 16 purposes, self-defense in their homes.
- 17 31. Plaintiffs EDWARD ERIKSON and VERNON NEWMAN:
- 18 a. Plead or were convicted of domestic violence misdemeanors.
- 19 i. Plaintiff ERIKSON's date of conviction was 1996.
- 20 ii. Plaintiff NEWMAN'S date of conviction was 1997.
- 21 b. In 1993 the California Legislature amended Penal Code § 12021 to create a list of
- 22 domestic violence misdemeanors which prohibit a person from
- 23 acquiring/possessing a firearm for 10 years after the date of conviction.
- 24 c. On September 13, 1994, Congress passed the Violence Against Women Act, and
- 25 in 1996 Congress amended the act to impose a lifetime ban on the
- 26 acquisition/possession of firearms by misdemeanants convicted of Domestic
- 27 Violence. 18 U.S.C. §§ 921 and 922 *et seq.*
- 28 d. Plaintiffs ERIKSON and NEWMAN cannot avail themselves of the relief

- provisions under California Penal Code § 12021(c)(3) by the terms of that statute.
(i.e., their convictions occurred after 1993.)
- e. Plaintiffs ERIKSON and NEWMAN have availed themselves of the provisions of California Penal Code § 1203.4. Their petitions were granted.
- f. As of October 25, 2010, Plaintiffs ERIKSON and NEWMAN are permitted to acquire and possess firearms under the laws of the State of California.
- g. As of October 25, 2010, Plaintiffs ERIKSON and NEWMAN are prohibited from acquiring and possessing firearms due to a threat of criminal prosecution under federal law.
- h. But for Defendants' wrongful interpretation of the federal laws regulating firearm possession and purchase by domestic violence misdemeanants, Plaintiffs ERIKSON and NEWMAN would acquire, keep and bear arms for, among other lawful purposes, self-defense in their homes.
32. Plaintiff JEFF LOUGHREN was convicted of a misdemeanor, California Penal Code § 242, on May 26, 1992.
- a. In 1993 the California Legislature amended Penal Code § 12021 to create a list of misdemeanors which prohibit a person from acquiring/possessing a firearm for 10 years after the date of conviction.
- b. On September 13, 1994, Congress passed the Violence Against Women Act, and in 1996 Congress amended the act to impose a lifetime ban on the acquisition/possession of firearms by misdemeanants convicted of Domestic Violence. 18 U.S.C. §§ 921 and 922 *et seq.*
- c. On May 26, 1994, Plaintiff LOUGHREN was granted relief under California Penal Code § 1203.4.
- d. On November 23, 1998, Plaintiff LOUGHREN was granted a motion to vacate his 1992 judgment of conviction pursuant to a *Writ of Error Coram Nobis*.
- e. Plaintiff LOUGHREN has not availed himself of the relief provisions under California Penal Code § 12021(c)(3) as this would be a futile act based upon

1 passage of 10 years time and the Federal Government's current interpretation of
2 18 U.S.C. §§ 921 and 922 *et seq.*

- 3 f. As of October 25, 2010, Plaintiff LOUGHTRAN is permitted to acquire and
4 possess firearms under the laws of California and North Dakota.
5 g. As of October 25, 2010, Plaintiff LOUGHTRAN is prohibited from acquiring and
6 possessing firearms due to a threat of criminal prosecution under federal law.
7 h. But for Defendants' wrongful interpretation of the federal laws regulating firearm
8 possession and purchase by domestic violence misdemeanants, Plaintiff
9 LOUGHTRAN would acquire, keep and bear arms for, among other lawful
10 purposes, self-defense in his home.

11 33. Plaintiff WILLIAM EDWARDS:

- 12 a. Plaintiff EDWARDS suffered a conviction for Penal Code § 415 (Disturbing the
13 Peace) on or about July 15, 2005.
14 b. Since that date, Plaintiff EDWARDS has been denied the right to own, possess or
15 purchase firearms.
16 c. Plaintiff Plaintiff EDWARDS is not prohibited under California Law from
17 possessing or purchasing firearms.
18 d. Penal Code § 415 [Disturbing the Peace] states:

19 Any of the following persons shall be punished by imprisonment in the
20 county jail for a period of not more than 90 days, a fine of not more than
21 four hundred dollars (\$400), or both such imprisonment and fine:

- 22 (1) Any person who unlawfully fights in a public place or
23 challenges another person in a public place to fight.
24 (2) Any person who maliciously and willfully disturbs another
25 person by loud and unreasonable noise.
26 (3) Any person who uses offensive words in a public place
27 which are inherently likely to provoke an immediate violent
28 reaction.

- e. California Penal Code § 415 is not a crime of domestic violence under 18 U.S.C.
§ 921 and/or 922 *et seq.*

- 1 f. California does have specific vigorously enforced Domestic Violence statutes:
- 2 i. Penal Code § 243(e).
- 3 ii. Penal Code § 273.5.
- 4 g. Plaintiff EDWARDS has been denied the right to purchase or possess firearms
- 5 solely based on the Federal Government's wrongful application and/or
- 6 interpretation of 18 U.S.C. §§ 921 and 922 *et seq.*
- 7 h. But for Defendants' wrongful interpretation of the federal laws defining domestic
- 8 violence misdemeanants, Plaintiff EDWARDS would acquire, keep and bear arms
- 9 for, among other lawful purposes, self-defense in his home.

10

11 **FIRST CLAIM - Declaratory Relief**

- 12 34. Paragraphs 1 through 33 are incorporated by reference as if fully set forth herein.
- 13 35. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiff RICHARD ENOS has not been convicted of
- 14 a crime of domestic violence under any one of three possible theories:
- 15 a. RICHARD ENOS was not apprized of the possibility of losing his firearm rights
- 16 when he plead no contest to a misdemeanor crime of Domestic Violence back in
- 17 1991, as there was no federal or state law prohibiting Domestic Violence
- 18 misdemeanants from acquiring/possessing firearms upon conviction. Therefore
- 19 he could not make a knowing/intelligent waiver of his right to a trial.
- 20 b. RICHARD ENOS applied for and was granted a restoration of his rights under
- 21 California Penal Code § 12021(c)(3) by a Superior Court Judge in Santa Clara
- 22 County California.
- 23 c. And finally, the State of California restores the right to possess firearms for
- 24 Domestic Violence misdemeanants 10 years after conviction, by operation of law.
- 25 36. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive Plaintiff
- 26 RICHARD ENOS of the "right to keep and bear arms" he would otherwise enjoy if the
- 27 Defendants correctly applied the law.

28 ////

SECOND CLAIM – Declaratory Relief

37. Paragraphs 1 through 33 are incorporated by reference as if fully set forth herein.

38. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiffs JEFF BASTASINI, LOUIE MERCADO,
WALTER GROVES and MANUEL MONTEIRO have not been convicted of a crime of
domestic violence under any one of two possible theories:

a. JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES and MANUEL MONTEIRO were not apprized of the possibility of losing their firearm rights when they plead no contest to a misdemeanor crime of Domestic Violence as there was no federal or state law prohibiting Domestic Violence misdemeanants from acquiring/possessing firearms upon conviction. Therefore they could not make a knowing/intelligent waiver of their right to a trial.

b. And, the State of California restores the right to possess firearms for Domestic Violence misdemeanants 10 years after conviction, by operation of law.

39. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive Plaintiffs JEFF BASTASINI, LOUIE MERCADO, WALTER GROVES and MANUEL MONTEIRO of the “right to keep and bear arms” they would otherwise enjoy if the Defendants correctly applied the law.

THIRD CLAIM – Declaratory Relief

40. Paragraphs 1 through 33 are incorporated by reference as if fully set forth herein.

41. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiffs EDWARD ERIKSON and VERNON
NEWMAN have not been convicted of a crime of domestic violence because the State of
California restores the right to possess firearms for Domestic Violence misdemeanants 10
years after conviction, by operation of law.

42. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive Plaintiffs EDWARD ERIKSON and VERNON NEWMAN of the “right to keep and bear arms” they would otherwise enjoy if the Defendants correctly applied the law.

1 / 1

FOURTH CLAIM – Declaratory Relief

- 2 43. Paragraphs 1 through 33 are incorporated by reference as if fully set forth herein.

3 44. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiff JEFF LOUGHAN has not been convicted

4 of a crime of domestic violence under any one of three possible theories:

5 a. Loughran was not apprized of the possibility of losing his firearm rights when

6 he plead no contest to a misdemeanor crime of Domestic Violence as there was no

7 federal or state law prohibiting Domestic Violence misdemeanants from

8 acquiring/possessing firearms upon conviction. Therefore he could not make a

9 knowing/intelligent waiver of his right to a trial.

10 b. Loughran applied for and was granted an order vacating his original judgment

11 of conviction pursuant to a *writ of error coram nobis* .

12 c. And finally, the State of California restores the right to possess firearms for

13 Domestic Violence misdemeanants 10 years after conviction, by operation of law.

14 45. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive Plaintiff

15 Loughran of the “right to keep and bear arms” he would otherwise enjoy if the

16 Defendants correctly applied the law.

FIFTH CLAIM - Declaratory Relief

- 19 46. Paragraphs 1 through 33 are incorporated by reference as if fully set forth herein.

20 47. Pursuant to 18 U.S.C. § 921(a)(33) Plaintiff EDWARDS has not been convicted of a

21 crime of domestic violence, so has to prohibit him from acquiring/possessing firearms

22 because the crime of disturbing the peace does not contain as an element of the crime:

23 a. The use or attempted use of physical force, or the threatened use of a

24 deadly weapon, committed by a current or former spouse, parent, or

25 guardian of the victim, by a person with whom the victim shares a child in

26 common, by a person who is cohabiting with or has cohabited with the

27 victim as a spouse, parent, or guardian, or by a person similarly situated

28 to a spouse, parent, or guardian of the victim.

1 48. Defendants have misinterpreted 18 U.S.C. § 921(a)(33) so as to deprive Plaintiff
2 EDWARDS of the “right to keep and bear arms” he would otherwise enjoy if the
3 Defendants correctly applied the law.

SIXTH CLAIM – Second Amendment

6 49. Paragraphs 1 through 48 are incorporated by reference as if fully set forth herein.

7 50. The Second Amendment to the United States Constitution provides in part that: “*the*
8 *right of the people to keep and bear Arms shall not be infringed.*”

9 51. On its face, 18 U.S.C. §§ 921(a)(33), 922(d)(9) and 922(g)(9) violates the Second
10 Amendment to the United States Constitution because it imposes a lifetime ban on the
11 exercise of a fundamental constitutional “right to keep and bear arms” after conviction of
12 a minor crime.

13 52. As applied to the facts of this case, the Defendants’ interpretations of 18 U.S.C. §§
14 921(a)(33), 922(d)(9) and 922(g)(9) violates the Second Amendment to the United States
15 Constitution because it imposes a lifetime ban on the exercise of a fundamental
16 constitutional “right to keep and bear arms” after conviction of a minor crime.

SEVENTH CLAIM – First Amendment

19 53. Paragraphs 1 through 48 are incorporated by reference as if fully set forth herein.

20 54. The First Amendment to the United States Constitution provides in part that: *Congress*
21 *shall make no law...abridging... the right of the people...to petition the Government for a*
22 *redress of grievances.*

23 55. On its face, 18 U.S.C. §§ 921(a)(33), 922(d)(9) and 922(g)(9) violates the rights of the
24 Plaintiffs under the First Amendment to the United States Constitution, because it
25 imposes a lifetime ban on the exercise of a fundamental constitutional right for a minor
26 crime without providing a statutory remedy to petition their government for restoration of
27 that right.

28 56. As applied to the facts of this case, Defendants' interpretations of 18 U.S.C. §§

921(a)(33), 922(d)(9) and 922(g)(9) violates the rights of the Plaintiffs under the First Amendment to the United States Constitution, because it imposes a lifetime ban on the exercise of a fundamental constitutional “right to keep and bear arms” after conviction for a minor crime without providing a statutory remedy to petition their government for restoration of that right.

EIGHTH CLAIM – Tenth Amendment

- 8 57. Paragraphs 1 through 48 are incorporated by reference as if fully set forth herein.

9 58. The Tenth Amendment to the United States Constitution provides: "*The powers not*
10 *delegated to the United States by the Constitution, nor prohibited by it to the*
11 *States, are reserved to the States respectively, or to the people.*"

12 59. On its face, 18 U.S.C. §§ 921(a)(33), 922(d)(9) and 922(g)(9) violates the Tenth
13 Amendment to the United States Constitution because it usurps the States' powers to
14 define and provide for the rehabilitation of minor public offenses.

15 60. As applied to the facts of this case, the Defendants' interpretations of 18 U.S.C. §§
16 921(a)(33), 922(d)(9) and 922(g)(9) violates the Tenth Amendment to the United States
17 Constitution because it usurps the States' powers to define and provide for the
18 rehabilitation of minor public offenses.

19 61. This usurpation of power by the federal government is directly responsible for the
20 infringement of the Plaintiffs' fundamental "right to keep and bear arms."

NINTH CLAIM – Fifth Amendment “Due Process”

- 23 62. Paragraphs 1 through 48 are incorporated by reference as if fully set forth herein.

24 63. The Fifth Amendment to the United States Constitution provides in part that: “*No person*
25 *shall... be deprived of life, liberty or property, without due process of law...*”

26 64. Part of the protection afforded Plaintiffs under the Fifth Amendment Due Process Clause
27 against the federal government is the guarantee of “equal protection” under the law.

28 65. On its face, 18 U.S.C. §§ 921(a)(33), 922(d)(9) and 922(g)(9) violates the Fifth

1 Amendment to the United States Constitution because it imposes a lifetime ban on the
2 exercise of a fundamental constitutional right for a minor crime without providing a
3 statutory remedy for restoration of that right, even though a provision exists in federal law
4 for the restoration of rights by felons. See 18 U.S.C. § 925(c).

5 66. As applied to the facts of this case, the Defendants' interpretations of 18 U.S.C. §§
6 921(a)(33), 922(d)(9) and 922(g)(9) violates the Fifth Amendment to the United States
7 Constitution because it imposes a lifetime ban on the exercise of a fundamental
8 constitutional right for a minor crime without providing a statutory remedy for restoration
9 of that right, even though a provision exists in federal law for the restoration of rights by
10 felons. See 18 U.S.C. § 925(c).

11

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs prays that this Court will enter judgment as follows:

- 14 A. Declaratory and injunctive relief that all Plaintiffs are not subject to the prohibitions set
15 forth in 18 U.S.C. §§ 922(d)(9) and 922(g)(9).
16 B. Declaratory and injunctive relief that 18 U.S.C. §§ 922(d)(9) and 922(g)(9) are
17 unconstitutional on their face and as applied to all Plaintiffs.
18 C. Award Plaintiffs their reasonable attorney fees and costs under 28 U.S.C. § 2412, 42
19 U.S.C. § 1988 and/or 18 U.S.C. § 925A.
20 D. Such other and further relief as this Court deems just and proper.

21 Respectfully Submitted on January 10, 2011,

22 _____ /s/
23 Donald E.J. Kilmer, Jr., (SBN: 179986)
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---oo---

BEFORE THE HONORABLE JOHN A. MENDEZ, JUDGE

---oo---

RICHARD ENOS, et al.,

Plaintiffs,

vs.

No. Civ. S-10-2911

ERIC HOLDER, as United
States Attorney General,
et al.,

Defendants.

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---oo---

REPORTER'S TRANSCRIPT

MOTION FOR SUMMARY JUDGMENT

WEDNESDAY, JANUARY 25, 2012

---oo---

Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

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Assistant United States Attorney

1 SACRAMENTO, CALIFORNIA

2 WEDNESDAY, JANUARY 25, 2012, 1:30 P.M.

3 ---oo---

4 THE CLERK: Civil S-10-2911; Enos, et al. versus
5 Holder, et al.

6 MR. KILMER: Good afternoon, your Honor. Donald
7 Kilmer for the plaintiffs.

8 THE COURT: Good afternoon.

9 MR. OLSEN: Good afternoon, your Honor. Edward Olsen
10 from the U.S. Attorney's Office on behalf of the defendants.

11 THE COURT: Welcome back.

12 MR. KILMER: May we be seated, your Honor?

13 THE COURT: You may both be seated. Just keep the
14 microphones in front of you.

15 All right. The motion to dismiss the second amended
16 complaint has been filed, opposed, and a reply brief has been
17 filed. A motion for summary judgment was also filed by the
18 plaintiffs. Actually, it's been fully briefed as well, but
19 the Court moved the hearing on the summary judgment motion I
20 think to March. I want to take up the motion to dismiss
21 first.

22 MR. KILMER: Your Honor, may I be heard on the date
23 that the Court selected?

24 THE COURT: Yes.

25 MR. KILMER: That is actually the very week that I'm

1 going to be arguing Nordyke before an en banc panel of the
2 Ninth Circuit. So I was wondering if we could hear that
3 motion for summary judgment either the week after or two
4 weeks later.

5 THE COURT: Remind me at the end of this, and we'll
6 take a look at it.

7 MR. KILMER: I will, your Honor. Thank you.

8 THE COURT: Right now, it's scheduled for March 21st,
9 but we'll take that up at the end.

10 Okay. Let me go through first some of the -- I don't
11 want to call them minor arguments but arguments raised in the
12 motion to dismiss that don't necessarily get to the merits of
13 the lawsuit. The first being the alleged failure to name the
14 United States as a defendant as opposed to naming the
15 Attorney General and the Director of the FBI since
16 jurisdiction is based on 18 U.S.C. Section 925A. And the
17 statute's quoted.

18 I guess the question I have, Mr. Olsen, I tend to
19 agree with you, but why did it take so long to raise this
20 argument, and why didn't you just call Mr. Kilmer up and say,
21 you know, there might be a problem with the named defendants?
22 Because obviously I would grant him leave to amend. So is
23 there some reason, is there some tactical advantage that I'm
24 missing as to why you included this argument as opposed to
just running it by him? All he's got to do is, I assume, is

1 after Mr. Holder's name add "and the United States Department
2 of Justice" and after Director Mueller's name add "and the
3 Federal Bureau of Investigation." Right?

4 MR. OLSEN: There was no tactical reason, your Honor.
5 I think in the first amended complaint, it wasn't clear at
6 least to the government what jurisdictional basis the
7 plaintiffs were asserting for their declaratory relief claim.
8 So I think the government's primary argument in the first
9 motion to dismiss was based on the lack of clarity as to what
10 the jurisdictional basis was.

11 I think when it was clarified in the second amended
12 complaint that, indeed, we are bringing our declaratory
13 relief claims under 18 U.S.C. Section 925A, I focused a
14 little bit more on that statute and looked at the plain
15 language and realized the statute commands that the United
16 States be the only proper defendant, not the individuals. I
17 suppose at that point in time, I could have called
18 plaintiffs' counsel. I wouldn't object, obviously, if the
19 Court denies the government's motion to dismiss on the more
20 substantive arguments, we wouldn't have any objection to
21 amending the complaint another time to give them an
22 opportunity to name the United States.

23 THE COURT: Well, would you just stipulate at this
24 point --

25 MR. OLSEN: Sure.

1 THE COURT: -- to naming the two departments as
2 defendants, or do you really want him to --

3 MR. OLSEN: I'd be happy to stipulate to the United
4 States being the only proper defendant in the action.

5 THE COURT: Okay. Mr. Kilmer, I do think that the
6 statute is clear. It should be read as Mr. Olsen indicated.
7 I know you oppose that, but I think his reading and the plain
8 and clear reading of the statute is clear. It's, again, not
9 a difference that goes to the merits.

10 MR. KILMER: I'm certainly not going to jeopardize my
11 case for not naming the proper defendant, your Honor. I'm
12 happy to stipulate to rename the defendants in this.

13 THE COURT: All right. So the Court accepts the
14 stipulation.

15 MR. KILMER: Just so we're clear, though, your Honor,
16 so the stipulation will read: Eric Holder, as United States
17 Attorney General, United States Department of Justice.

18 THE COURT: You have to name the Department of Justice
19 and the Federal Bureau of Investigation.

20 MR. KILMER: I will do so.

21 THE COURT: Or, Mr. Olsen, do you think it should just
22 be the United States of America in general? Because in all
23 the cases I've read, it's actually the department itself
24 that's named as a defendant.

25 MR. OLSEN: Well, I'm not sure I, frankly, care that

1 much, but I do think the statute says the United States. So
2 in my view, my reading of the statute is that it's the United
3 States should be named.

4 MR. KILMER: I would not be opposed, your Honor, to
5 just amending the designation of Attorney General Holder by
6 adding Department of Justice, redesignating Robert Mueller as
7 Director of FBI and the Federal Bureau of Investigation.

8 The problem is if I have to add the United States as a
9 party, I'm going to be required to get an amended summons and
10 re-serve.

11 THE COURT: Well, that's the question.

12 MR. KILMER: And I'm happy to do that.

13 THE COURT: That's a question to Mr. Olsen. Are you
14 willing to waive that?

15 MR. OLSEN: I'm happy to waive service. I'm not sure
16 I understand that argument, but I'm happy to waive any
17 objections to service if he's just adding the United States
18 or substituting the United States for the individually named
19 defendants.

20 THE COURT: I think it really just goes to what the
21 caption should read, that it should read versus the United
22 States of America rather than naming Eric Holder and Robert
23 Mueller. You can't sue the individuals. You have to sue the
24 United States under that statute.

25 MR. KILMER: I'm interested in the relief for my

1 clients. I don't care who ends up as a defendant in this
2 case. I'm happy to amend it to the United States of America,
3 and I understand that there's a stipulation that a new
4 summons, an amended summons, and re-service will not be
5 necessary.

6 THE COURT: That's what I've heard. If you need that
7 in writing, the two of you can work it out.

8 MR. KILMER: Thank you, your Honor.

9 THE COURT: Okay. Just a quick question. Would that
10 apply, do you believe, Mr. Olsen, to all four claims or just
11 the declaratory relief claims?

12 MR. OLSEN: That's my understanding of the declaratory
13 relief claims. And that's the only argument that the
14 government has made in terms of naming the proper defendants.

15 THE COURT: So the fourth claim under the Second
16 Amendment, he could name Holder and Mueller. Is that what
17 you're saying?

18 MR. OLSEN: We haven't objected to his naming the
19 def -- I haven't done a lot of research on that, your Honor.

20 THE COURT: Okay. All right. The other issue is an
21 issue, Mr. Kilmer, that I don't think you -- I'm pretty clear
22 you didn't read the motion to dismiss carefully with respect
23 to this argument. And that is that they say that your
24 clients don't have any standing to bring a challenge to
25 922(d)(9). In your opposition, you talk about 922(g)(9).

1 And that's not the argument. The argument is that because
2 (d) (9) deals with persons who sell or otherwise dispose of
3 firearms, and none of the plaintiffs, at least as I can tell,
4 is a person who sells or otherwise disposes of firearms. And
5 your complaint does include references to 922 (d) (9), and you
6 didn't respond to that in the opposition.

7 MR. KILMER: Your Honor, one of the reasons why we
8 dealt with the people who can transfer firearms is we need an
9 interpretation of that statute as well, because part of the
10 problem that my clients are caught in the middle is that a
11 federally licensed firearms dealer is interpreting federal
12 law based on the federal government's interpretation that I
13 can't sell a gun to you.

14 THE COURT: I'm not arguing with that, but there's no
15 plaintiff that sells guns.

16 MR. KILMER: No, but my plaintiffs are trying to buy
17 guns from dealers who do need that statute interpreted for
18 them.

19 THE COURT: Why does that give your clients standing?
20 That's the issue raised by the government.

21 MR. KILMER: Because my clients need to be able to buy
22 weapons, your Honor.

23 THE COURT: Well, that's why (g) (9) is being
24 challenged, not (d) (9). There's no plaintiff that can, at
25 least named in this lawsuit, that has standing to challenge

1 (d) (9), as far as I can tell. The argument has merit. And
2 since you didn't oppose it at all in the opposition, there
3 really is no opposition, and I don't think I have any other
4 choice but to grant that portion of the motion as well.

5 MR. KILMER: Well, that sounds like it would be more,
6 for instance, a motion to strike some part of the claim, your
7 Honor, but it doesn't strike the claim.

8 THE COURT: It only strikes -- I assume you just want
9 to strike references to (d) (9). And it's referenced, in
10 particular, in the fourth claim, the Second Amendment claim.
11 I didn't see it referenced anywhere else. I'm looking at the
12 second amended complaint. I don't know if you did,
13 Mr. Olsen, but that's the only place that I saw it.

14 MR. OLSEN: The government would be happy with
15 striking all references to (d) (9) to make it clear that the
16 challenge here is to 922(g) (9), not (d).

17 THE COURT: Okay. I'm going to grant that motion,
18 that portion of the motion. Any references to 922(d) (9) will
19 be stricken from the second amended complaint.

20 MR. KILMER: So we're talking about paragraph 17 of
21 the second amended complaint.

22 THE COURT: Well, there's another paragraph too. Hang
23 on.

24 MR. OLSEN: It's in 47.

25 THE COURT: It's in 47, too, yes. It's in 17, and

1 it's primarily in -- it's actually in 46 and 47.

2 MR. KILMER: I see. Got it.

3 THE COURT: Okay.

4 MR. OLSEN: And the prayer for relief.

5 THE COURT: And the prayer for relief. Right.

6 Any references to (d) (9) will be stricken.

7 Okay. In the fourth claim, again staying on that, in
8 paragraph 46, you indicate in the complaint at least that
9 this is a facial challenge, but in the opposition you seem to
10 withdraw that facial challenge. Is that accurate?

11 MR. KILMER: Yes, it is, your Honor.

12 THE COURT: Okay. So paragraph 46 will also be
13 stricken from this complaint.

14 MR. OLSEN: Your Honor, if I could just be heard
15 briefly on that point.

16 THE COURT: Go ahead.

17 MR. OLSEN: It's difficult for the government to
18 understand based on the second amended complaint and the
19 opposition to the motion to dismiss exactly what the nature
20 of their Second Amendment challenge is. The statute has not
21 been applied to the plaintiffs. So I'm not sure how the --
22 and the government addressed this more, frankly, in the
23 motion to dismiss the first amended complaint. But the
24 statute hasn't been applied to the plaintiffs, so I don't see
25 how they can bring an as-applied challenge. What I can see,

1 and there are references to this in some of the cases that
2 are cited by both parties, is that their challenge to this
3 lifetime ban is really --

4 THE COURT: Don't jump there yet. Let me get to that
5 slowly.

6 MR. OLSEN: Okay.

7 THE COURT: We'll come back to that, because I think
8 that's the guts of this argument that I need to hear from
9 both of you on. So keep that thought. We'll definitely come
10 back to it. Okay?

11 All right. I want to focus on the declaratory relief
12 claims first. And again, although I'm not here to discuss
13 the summary judgment motion, Mr. Kilmer, you did sort of take
14 an interesting approach in the summary judgment motion that
15 you really want me to focus primarily on the declaratory
16 relief as opposed to the Second Amendment. And I want to
17 start with the declaratory relief claims themselves.

18 Also for purposes of this motion, as Mr. Kilmer, you
19 raised, I am assuming that all the allegations that are set
20 forth in the second amended complaint are true. Presumptions
21 are drawn in favor of the plaintiffs. But, quite frankly, I
22 don't see any factual disputes -- we can talk about that, but
23 I don't really see a factual dispute in this lawsuit. It's
24 purely a question of law.

25 MR. KILMER: We would agree, your Honor.

1 THE COURT: Okay. You ask the Court in the first
2 claim, second claim, and third claim, dealing with different
3 plaintiffs but basically the same, to enter a declaratory
4 judgment which, in effect, would state that the plaintiffs
5 have not been convicted of a crime of domestic violence
6 pursuant to 18 U.S.C. Section 921(a)(33). And (a)(33) is the
7 Section, 921(a)(33), that defines the terms of someone who's
8 been convicted of a misdemeanor crime of domestic violence,
9 and then it contains the exceptions.

10 There's no argument that all the plaintiffs were
11 convicted of crimes of misdemeanor crimes of domestic
12 violence. Again, that's undisputed.

13 And then the approach and the theory in this lawsuit
14 is that specifically the exception that should be applied --
15 well, the first attack is that you want me to find that at
16 the time that these plaintiffs entered their pleas, and it
17 may not apply to at least this portion, it only seems to be
18 alleged as to Enos, Bastasini, Mercado, Groves, and Monteiro.
19 Only those plaintiffs. That when they entered their nolo
20 plea, no contest plea to the misdemeanor, that there was no
21 federal or state law prohibiting domestic violence
22 misdemeanants from acquiring/possessing firearms upon
23 conviction. And then you jump right to the legal conclusion
24 you want me to make, which is, therefore, he could not make a
25 knowing or intelligent waiver of his right to a trial which

1 would bring him within one of those exceptions under (a) (33),
2 or them under (a) (33).

3 The government's response to that is as follows.
4 There's too many briefs up here. There it is. I'm sorry.
5 It's in the reply brief. And it's under 18 U.S.C. -- the
6 argument that plaintiffs raise is that under 18 U.S.C.
7 Section 921(a) (33) (B) (i) (II) (bb), that because they did not
8 make knowing and intelligent waivers of the right to a jury
9 trial, that they can't be found to have been convicted of a
10 misdemeanor crime of domestic violence.

11 Plaintiffs argue that their waivers of the right to a
12 jury trial were not knowing and intelligent because they were
13 not apprised of the possibility of losing their right to
14 possess a firearm if they were convicted.

15 The first argument the government raises is that
16 plaintiffs have cited no authority for the proposition that
17 in a civil proceeding brought under 18 U.S.C. Section 925A,
18 that in a civil lawsuit such as this that the Court does have
19 jurisdiction to determine that an individual's waiver of his
20 or her right to a jury trial that was made in a state
21 criminal proceeding was not knowing and intelligent. So
22 there's a jurisdictional argument.

23 And then, second, the government argues that, in any
24 event, the plaintiffs' argument lacks merit. First, when a
25 person enters a guilty or no contest plea, he must be advised

1 of all direct consequences of the conviction. This
2 requirement relates to the primary and direct consequences
3 involved in the criminal case itself and not to secondary,
4 indirect, or collateral consequences. And again, there's
5 cases cited throughout to support these propositions.

6 Direct consequences of a guilty plea include the
7 statutory range of punishment for the conviction, probation
8 ineligibility, and a required term of parole. Citing People
9 vs. Crosby, the government argues a collateral consequence is
10 one which does not inexorably follow from a conviction of the
11 offense involved in the plea. Citing People vs. Gurule, the
12 government argues the possible future use of a current
13 conviction is not a direct consequence of the conviction. If
14 a consequence is only collateral, no advisement is required.

15 These plaintiffs that raise this argument in the
16 complaint acknowledge that there is, and again, there's no
17 dispute that at the time of their pleas, individuals with
18 convictions for misdemeanor crimes of domestic violence were
19 not prohibited from possessing firearms since 922(g)(9), 18
20 U.S.C. 922(g)(9), wasn't enacted until 1996. All these pleas
21 were before that date.

22 And the argument then is that plaintiffs cannot
23 reasonably argue that they were not apprised of a direct
24 consequence of their conviction since the law obviously
25 doesn't require defendants to be apprised of future

1 unanticipated changes in the law.

2 And the only case, Mr. Kilmer, that you cite in
3 support of the argument is Padilla vs. Kentucky, and that is
4 distinguished on page 7 of the reply brief.

5 I find this argument to have a lot of merit. I don't
6 know, particularly thinking back to my own experience, both
7 in state and federal court, I have no idea how I could
8 apprise someone who I'm taking a plea from of some possible
9 future consequence, and because I didn't apprise them of a
10 future consequence, that didn't mean that there wasn't a
11 conviction or a valid conviction or a valid plea. And
12 Padilla doesn't stand for that.

13 So is there some other case that you think warrants
14 that conclusion? Because, honestly, I think it's a creative
15 argument, but as a matter of law, I don't think there's any
16 support, particularly given all the cases cited by the
17 government that just say there's no merit to that argument.

18 MR. KILMER: My response, your Honor, is that the
19 reason why there's no case law dealing with collateral
20 consequences that were ex-post facto collateral consequences
21 imposed on people after they pled their cases is because the
22 status of the Second Amendment as a fundamental right was in
23 some form of limbo in 1996. In 1996, nobody knew,
24 notwithstanding the fact that the Second Amendment was over
25 200 years old, but nobody knew that in 2008, the U.S. Supreme

1 Court was going to say no, it's a fundamental civil right.
2 If it was, then it's quite possible that Lautenberg may have
3 addressed that, but it didn't.

4 The point is that it's a fundamental civil right.

5 This collateral consequence is at least as fundamental as
6 whether or not you're going to be deported. And that's why
7 we cited the Padilla case.

8 I have to concede the point that there's no case law
9 interpreting this. I think the Court is left without any
10 guidance from any superior courts on this, except for the
11 fact that Heller and McDonald have given us a new paradigm
12 for taking a look at these restrictions.

13 In 1993, California led the nation in proposing that
14 misdemeanor crimes of domestic violence would result in the
15 collateral consequence of not having firearms for ten years.
16 When Lautenberg came along, the Lautenberg amendment was
17 attempting to address the fact that 49 other jurisdictions
18 either didn't address the issue or they simply prosecuted
19 domestic violence as a common law crime or they had no
20 provisions at all for restricting these misdemeanants of
21 access to firearms.

22 In fact, in some of the arguments, Senator Lautenberg
23 himself talked about repeat offenders and that the reason why
24 he wanted to protect women with the Lautenberg amendment was
25 to prevent the repeat offender from going back after a

1 conviction, getting a gun, and harming somebody. Well, the
2 argument that they couldn't have been apprised of this
3 because it didn't exist, I'll admit it was an artful drafting
4 and creative on our part, but the fact of the matter is that
5 nobody knew what the status of the Second Amendment was going
6 to be until 2008.

7 And what's interesting is the State of California even
8 acknowledged this ex-post facto consequence in Penal Code
9 Section 12021(c)(3) where it said that if you were convicted
10 of a misdemeanor crime of domestic violence prior to that
11 statute being added to 12021, you could petition for a
12 one-time relief. So there was an acknowledgment in the law
13 that people should not be subject to the loss of some right
14 or privilege for prior convictions or prior pleas based upon
15 a new public policy by the government.

16 THE COURT: I also, I have to say, I find a lot of
17 merit in what I labeled the jurisdictional argument. I think
18 this type of argument maybe should have or maybe still can be
19 made to the superior court in which the nolo pleas were
20 entered on a motion to set aside the plea. I'd like to know
21 if the state court agrees with your argument or not. It's an
22 interesting argument. But I don't think a federal court has
23 any business, especially in a state court conviction, issuing
24 some type of decision that might affect a state criminal
25 case.

1 I'm reluctant to go there. It's not the basis for my
2 finding merit to the government's argument, but it rings, I
3 think, true that maybe the starting point with this type of
4 argument should have been or should be the superior court in
5 which the conviction was or the plea was entered.

6 It might be a basis for setting aside that plea, but,
7 again, given all the other law that was cited by the
8 government, I think you'd have a difficult time even in
9 superior court convincing a superior court judge that, you
10 know, that because of the change in the law, that they should
11 be allowed to withdraw their plea.

12 MR. KILMER: But this is the dilemma my clients keep
13 facing, your Honor. They're being told in federal court that
14 you have to go to state court for a state remedy. And then
15 when we go to state court -- we haven't tried it yet, but
16 perhaps we should in some future case. But we go to state
17 court, and the state court judge is just going to say you're
18 not prohibited under state law. I'm not going to interpret
19 federal law for you.

20 THE COURT: This doesn't require interpretation of
21 federal law.

22 MR. KILMER: No, your Honor. That's the exact point,
23 is that these plaintiffs have all passed the ten-year
24 prohibition under 12021. They're not prohibited under state
25 law from having a gun.

1 THE COURT: I understand all that. I'm just focused
2 on your pleading where you jump from the fact that they
3 weren't advised means that they didn't make a knowing and
4 intelligent waiver of their right to a jury trial. And I
5 don't find any merit in those allegations, that specific
6 allegation or that argument. So I would grant, clearly grant
7 the motion to dismiss with respect to that part of the first,
8 second, and third claims. Again, it only applies to Enos and
9 -- it's only in the first and second claim. It doesn't apply
10 to Erickson or Newman.

11 And then the second and third arguments raised by
12 Mr. Enos is the restoration of rights argument that we
13 discussed at the last motion to dismiss. I find it
14 interesting that in the claims, for example, the first claim
15 for declaratory relief, and I don't know if both of you have
16 the complaint in front of you, but paragraph 36(c), for
17 example, you ask for the Court to declare or enter a
18 declaratory judgment that the State of California restores
19 the right to possess firearms for domestic violence
20 misdemeanants ten years after conviction, by operation of
21 law.

22 And I would think, Mr. Olsen, that you actually
23 wouldn't object to that. That's an accurate statement of the
24 law.

25 MR. OLSEN: Correct.

1 THE COURT: But I guess the question I had,
2 Mr. Kilmer, is what does that buy you? Aren't you really
3 asking for -- I sort of wrote a note to myself saying
4 shouldn't that really allege that not only does the State of
5 California restore the right to possess, but that
6 satisfies -- what you're really asking me to find or make a
7 declaration that that actually satisfies the restoration of
8 civil rights exception that's found in 921(a) (33). That's
9 your argument; right?

10 MR. KILMER: Correct.

11 THE COURT: Okay. Because no one disputes that if
12 there was no federal government, your clients would be able
13 to purchase firearms. If only the states existed and the
14 Lautenberg amendment and Act didn't exist, they'd be free to
15 go about their business, because under California law, ten
16 years have passed.

17 MR. KILMER: And, in fact, your Honor, some of these
18 plaintiffs actually did, with the state's permission and
19 background check, purchase firearms after the ten years had
20 passed. And then going to make subsequent purchases, the
21 federal government either changed its interpretation, which
22 we don't know because we haven't done discovery yet. Either
23 they changed their interpretation or they started being
24 stricter in looking at these cases and saying no, your rights
25 weren't restored after the ten years. So we actually have

1 cases and we've actually alleged in our complaint that some
2 of these plaintiffs were actually cleared and did, in fact,
3 purchase firearms.

4 One of the things I had to do when I agreed to
5 represent these men is, you know, the federal government says
6 that you're a criminal, you need to dispose of your firearms,
7 and they all did.

8 THE COURT: It sounds like the marijuana cases,
9 doesn't it?

10 MR. KILMER: No comment.

11 THE COURT: Okay. Well, let's get back to this. And
12 we've been down this road before in terms of that portion of
13 the statute. Is it a civil right being restored? Is it
14 civil rights that have been restored? You know, does that
15 portion of this statute apply in light of Heller and
16 McDonald, the changes that people have argued that have been
17 brought about by those cases?

18 And I went back and reread the transcript of our last
19 hearing, and I'm not sure, and I'm not certain, and I reread
20 the order. But as I sit here right now, I'm not sure if I
21 punted that question or not. But it's obviously one that now
22 has been fully briefed for a second time and deserves a
23 response. And I don't know.

24 Mr. Olsen, how do you think I handled that the first
25 time around?

1 MR. OLSEN: The way I interpret the order, your Honor,
2 is that you gave plaintiffs one more opportunity to make that
3 argument in light of discussion that came up primarily at the
4 oral argument about Heller and that, well, maybe the cases
5 cited by the government need to be reexamined because
6 Heller's now created this individual right to bear arms, so
7 I'll give the plaintiff an opportunity to clarify his claim
8 in a second amended complaint. That's the way I read the
9 order.

10 The government's response to that is plaintiffs have
11 not stated a claim, even in light of Heller in their second
12 amended complaint. And I can go through the reasons why.
13 That's the way I interpret the order. I do think it's a
14 legal question.

15 THE COURT: And it's somewhat of a, Mr. Kilmer, I
16 think we discussed at the last hearing, an issue of first
17 impression with respect to this specific statute and this
18 specific state that you now want this Court to interpret
19 those words "civil rights restored" to include the rights
20 that were restored here. Again, there's no question that
21 their right to keep and bear arms has been restored at least
22 by the State of California.

23 And so the question I have, I always raise as a judge,
24 is isn't that a question that is more properly decided by the
25 Legislature? That shouldn't Congress take that up rather

1 than have a judge, in effect, rewrite this statute? Prior to
2 Heller and McDonald, it's always been interpreted, the
3 language "civil rights restored," to include only the right
4 to serve on a jury, the right to vote, and the right to run
5 for political office. So, in effect, you want me to -- I
6 don't have to necessarily rewrite the statute, but I just
7 have to interpret it in a way that's never been interpreted
8 in light of Heller and McDonald.

9 Is that sort of a fair summary of your argument?

10 MR. KILMER: In part, your Honor. There's no question
11 that Heller and McDonald were a game changer, because now we
12 have a fundamental right that we're dealing with, and we have
13 to decide whether or not it's a civil right for purposes of
14 restoring the statute.

15 In doing my research on this issue, I took a look at
16 pretty close to all 50 states' laws dealing with collateral
17 consequences for misdemeanor crimes of domestic violence.
18 And at some point in time, I just stopped looking. I found
19 one jurisdiction, New Jersey, which still has a sort of
20 hybrid common-law definition of domestic violence/battery.
21 And because you can do a two-year stretch, it also fits the
22 federal definition of a felony for not having a gun.

23 So I couldn't find any jurisdiction that deprived
24 anybody of the right to sit on a jury or the right to hold
25 public office or the right to vote for a misdemeanor

1 conviction, which means that the Lautenberg amendment sought
2 to impose some sort of requirement or some sort of gateway
3 before you could have your rights restored that doesn't
4 exist.

5 And I would just like to see something from the
6 government saying oh, yeah, no, we had this real big problem
7 with people being convicted of misdemeanor crimes of domestic
8 violence, they lost their right to vote, they lost their
9 right to sit on a jury. What we mean when we say
10 "restoration of rights" is that those misdemeanants also have
11 their right to vote and sit on a jury restored. That's a
12 nonsensical reading of the statute.

13 What Heller and McDonald does for these plaintiffs is
14 it says maybe the list of Civil Rights Act, jury, holding
15 public office, or the right to vote is incomplete, and we
16 need to add the right that's, by the way, specifically
17 addressed by Lautenberg, the right to keep and bear arms.

18 THE COURT: Mr. Olsen, you still rely on Brailey.

19 MR. OLSEN: Right.

20 THE COURT: You contend that it's inconsequential that
21 it was decided before Heller because, one, Heller recognized
22 an individual's right to bear arms, but this right is not
23 among the cluster of "citizen" rights that states extend to
24 individuals by virtue of citizenship within its borders; the
25 right to vote, hold public office, and sit on a jury. And

1 you cite a Seventh Circuit case which was post-Heller which
2 discusses civil rights under 921(a)(33)(B), United States
3 vs. Skoien, S-K-O-I-E-N, that that section,
4 921(a)(33)(B)(ii), refers to civil rights in the plural, and
5 restoration of the right to bear arms is only a singular
6 right. And then also your argument is that plaintiffs have
7 failed to explain how Congress in 1996 could have intended
8 that "civil rights restored" under (a)(33)(B)(ii) includes
9 the right to bear arms when this right was not recognized
10 until Heller in 2008.

11 Is there anything I missed?

12 MR. OLSEN: No. And I would emphasize the latter
13 point, because the question we're looking at is the
14 congressional intent. And Congress enacted the Lautenberg
15 amendment in 1996. So in defining civil rights, the
16 individual right to bear arms wasn't recognized by the
17 Supreme Court until three years ago. So obviously as a
18 matter of common sense, the Legislature couldn't have
19 intended civil rights to mean a right that wasn't in
20 existence. In addition to the fact that civil rights, as
21 other courts have interpreted it, means rights extended by
22 states to citizens by virtue of their citizenship in the
23 states. And the fact that it's in the plural. Even if we do
24 accept for purposes of argument that the right to bear arms
25 is a civil right contemplated by the Legislature, the

1 Legislature used civil rights in the plural, and I don't
2 think plaintiffs dispute that none of these other rights have
3 been taken away and restored. So I think --

4 THE COURT: So what happens if the plaintiffs went to
5 their local congressman and said Heller has changed
6 everything, and there's a problem with this Lautenberg
7 amendment? And you think the only way that they can bring
8 about the change that they seek in this lawsuit is through
9 legislative action?

10 MR. OLSEN: I think that's right, your Honor. Nothing
11 prevents the plaintiffs from petitioning the government in a
12 way similar to what people normally do when they're not happy
13 with the way a statute's written. They can ask their
14 congressman to bring a bill before Congress to change the
15 language and to point out, as the plaintiffs are arguing,
16 that there aren't many states, if any, that actually do
17 deprive a defendant of the three citizen rights that we've
18 been talking about when they've been convicted of misdemeanor
19 crimes of domestic violence. Those are perfectly appropriate
20 complaints to bring to Congress. But what we're looking at
21 now --

22 THE COURT: Well, why can't he bring that complaint to
23 a court as well? It would be a lot faster than going to
24 Congress.

25 MR. OLSEN: It may be faster than going to Congress.

1 But what we're looking at here, it's a matter of statutory
2 interpretation, and the Court's duty, as the Court well
3 understands, is to try and discern the intent of Congress in
4 passing the legislation and not rewriting or changing it.

5 THE COURT: Mr. Kilmer, do you want to respond to
6 that?

7 MR. KILMER: Well, your Honor, I would contend that
8 the Court's duty isn't just statutory interpretation, but the
9 Court has, as a coequal branch of government with the
10 Legislature, a duty to interpret the Constitution. And when
11 the Supreme Court has spoken in a case about what are the
12 parameters of a right contained in an enumerated part of our
13 Bill of Rights, I think the Court has a duty to interpret
14 statutes given that new information from the U.S. Supreme
15 Court.

16 I would like to address this issue of whether the
17 rights protected by the Second Amendment are plural or
18 singular. That issue was actually specifically addressed in
19 Heller in the majority opinion that discussed
20 Justice Stevens' contention that it's a unitary right, and
21 therefore keep and bear had some sort of military connotation
22 because you had to understand "keep" in relationship to
23 "bear." And the majority opinion was very specific, and it
24 says no, these are different concepts, these are different
25 rights, and it is not a unitary concept. I'm happy to

1 provide the Court with a supplemental citation to the exact
2 language in the opinion.

3 But there's all kinds of bundle of rights that go with
4 the possession of personal property. We don't have to go to
5 the Second Amendment for this. But when you have a piece of
6 personal property, if it's a firearm or an automobile,
7 there's a right of alienation, the right to possess, the
8 right to transfer, the right to dispose, the right to modify,
9 the right to inherit, the right to bequeath. So all of these
10 rights also attach to the personal property that's protected
11 by the Second Amendment; the right to keep and bear arms. So
12 there is multiple rights that my clients are being denied
13 because of this interpretation of Lautenberg.

14 THE COURT: That was in your summary judgment motion.
15 I did, just so both sides are aware, I did at least want to
16 review, and I took a look at the summary judgment motions,
17 and there is in your summary judgment motion an entire
18 argument about that which has been responded to by the
19 government.

20 And, Mr. Olsen, do you want to respond to why you
21 don't believe it's rights, plural, as opposed to a civil
22 right?

23 MR. OLSEN: Well, throughout Heller, the right is
24 talked about as a right, a singular right to keep and bear
25 arms. The plaintiffs haven't defined what they mean by

1 bundle of rights. I mean plaintiffs' counsel was just
2 talking about the right to property, but that's not what
3 we're talking about. We're talking about a right to keep and
4 bear arms, which the court consistently in Heller refers to
5 as a right. So I'd be interested to know what the bundle of
6 rights plaintiffs are talking about when we're talking about
7 not the right to property generally but the right to keep and
8 bear arms.

9 But even assuming the Court accepts that
10 interpretation that the right to keep and bear arms is
11 actually rights to keep and bear arms, that still doesn't
12 answer the government's first point, which is that the civil
13 rights that the Legislature was talking about refer to rights
14 extended by states by virtue of your citizenship; the right
15 to vote, the right to sit on a jury, and the right to hold
16 public office.

17 And that other point that I just mentioned, that if
18 we're trying to figure out what Congress meant in defining
19 civil rights in 1996, whether you call it a right to keep and
20 bear arms or rights to keep and bear arms, that right or
21 rights wasn't recognized until 2008. So Congress didn't have
22 a crystal ball and in defining civil rights thought well,
23 gee, maybe in 12 years or something, maybe the Supreme Court
24 will recognize the right or rights to bear arms, so we'll
25 include that in our definition of civil rights.

1 THE COURT: Just as an aside, Mr. Kilmer, because I
2 know you're intimately involved in court cases involving the
3 Second Amendment, but is there anything going on in the
4 Legislative side? I mean Heller is now almost four years
5 old. Has anyone asked Congress to look at this issue and
6 pursue an amendment to Lautenberg or is it just not on the
7 radar?

8 MR. KILMER: Quite honestly, your Honor, because I'm
9 so busy with litigation, I tend to ignore the legislative
10 side of things because I'm one person and unable to cover all
11 bases. I'm not personally aware that there's any legislation
12 pending to modify Lautenberg.

13 And as the Court is probably aware, it's a difficult
14 subject to talk about. People don't want to necessarily
15 recognize, you know, to use the vernacular, that wife beaters
16 should have their rights restored.

17 But the reason that we're here is that these
18 particular plaintiffs have demonstrated under the state
19 regime that they can both be rehabilitated and remain
20 law-abiding for more than ten years. And I think that the
21 gist of our argument and why the Court does not have to
22 reinterpret Lautenberg, you just simply have to apply the
23 reasoning in Heller and McDonald to interpret this. And it
24 is a case of first impression. In fact, it's quite possible
25 that because California led the nation in restricting firearm

1 rights for misdemeanor crime and domestic violence, this may
2 be the only state in which this can happen. But it's just,
3 as the Court has noted, it's beyond dispute that these
4 gentlemen lost their right to keep and bear arms under state
5 law. Whether they're plural or singular, I think that's a
6 red herring, and I don't think it means anything.

7 One of the things that the Legislature had -- learned
8 counsel pointed out they didn't have a crystal ball, but one
9 thing they did have is they had a dictionary and they also
10 had the prior cases. If they wanted to substitute the words
11 "civil rights" for anybody who loses the right to sit on a
12 jury, the right to hold public office, or the right to vote
13 as a consequence of their misdemeanor conviction, they have
14 to have those rights restored in order to have their firearm
15 rights restored, they could have just as easily said that.
16 They said "civil rights." And when the U.S. Supreme Court
17 spoke in 2008, it affirmed or at least re-recognized the
18 Second Amendment as a fundamental individual right protected
19 by the Second Amendment.

20 THE COURT: Okay. I want to get to the biggest issue
21 that's concerning me. And it comes back, Mr. Olsen, to sort
22 of the point you raised at the beginning about a
23 constitutional challenge to this statute. You know, what
24 does it mean as applied to the facts of this case.

25 I have a case where there's no dispute. Every

1 plaintiff has been convicted, ten years have passed, so
2 they've had their rights restored, the right to keep and bear
3 arms, at least under state law. They even petitioned under
4 1203.4 and had hearings, and a state court judge granted
5 those petitions. And I understand that Jennings -- we talked
6 about this last time, it's U.S. vs. Jennings, at least the
7 argument is it precludes Mr. Kilmer's clients from arguing
8 that their conviction has been expunged or set aside. It's
9 an interesting opinion because, Mr. Kilmer, when I started
10 thinking about this case again last night, I initially
11 thought well, why didn't you just argue that, that 1203.4 is
12 the functional equivalent of set aside or expunged. And
13 obviously Jennings sort of forecloses that argument.

14 So assuming that that's not the path you're proceeding
15 down, that you're not asking me to make that finding, here's
16 the problem I'm having, Mr. Olsen. I've got plaintiffs who
17 in every which way have rehabilitated themselves, have done
18 everything the state law has asked them to do, and they have
19 absolutely no further process by which they can, at least as
20 far as the federal government is concerned, for the rest of
21 their life keep or bear arms. There's nothing left under
22 state law. They can't be pardoned. I looked at that. They
23 can't under that Ninth Circuit case have a finding made that
24 their convictions have been expunged or set aside. If I
25 accept your civil rights argument, they haven't had their

1 civil rights restored because they were never taken away in
2 the first place. So there's no exception. And so it's a
3 lifetime ban.

4 And one of the cases Mr. Kilmer submitted to me,
5 although it involved an individual with mental illness,
6 Staten I think was the case, had some really interesting
7 language to me. And this is what's bothering me. The
8 language was: "Although the right established in Heller is a
9 qualified right, the right to possess arms is no longer
10 something that can be withdrawn by the government on a
11 permanent and irrevocable basis without due process."

12 And so I'm wondering now, as we sit here today, what
13 due process do these seven plaintiffs have? And so there's a
14 lot of discussion, and I appreciate the fact you address that
15 directly, the lifetime ban argument. You do it both in the
16 summary judgment motion and in the motion to dismiss. And
17 you cite primarily a Seventh Circuit case, the Skoien case.
18 And you also quote a case, United States vs. Smith.

19 And here's what I found interesting about the language
20 in those cases. First, in the Seventh Circuit case, it's
21 really interesting, they just flat out make a mistake.
22 Either someone didn't understand California law, or maybe
23 they did, because they cite to 1203.4a, which these
24 plaintiffs, by the way, couldn't have applied for relief
25 under because I think they all got probation.

1 MR. KILMER: That's correct, your Honor.

2 THE COURT: So again, that was foreclosed. If someone
3 would have argued well, heck, they've had, you know, years
4 and years to apply under 1203.4a, the answer is no, they
5 didn't because they didn't qualify under 1203.4a.

6 The only relief that they could have sought is the one
7 they did, which is under 1203.4. But now the Ninth Circuit
8 tells me well, that isn't the equivalent of a set aside or an
9 expungement. And so the language in these cases is as
10 follows: "Although the statute provides that expungement,
11 pardon, or restoration of civil rights means that a
12 conviction no longer disqualifies a person from possessing
13 firearms, Skoien maintains that, as a practical matter, these
14 routes to restoration are unavailable to domestic-battery
15 misdemeanants in Wisconsin."

16 Now, the plaintiffs in my case -- I'll stop for a
17 second there. In this case before the Court, it's not a
18 practical matter. It's a reality. They have absolutely no
19 way to restore their civil rights. "As the Supreme Court
20 observed in Logan vs. United States, although Wisconsin does
21 not deprive misdemeanants of the civil rights to vote, serve
22 on a jury, or hold public office, so these rights cannot be
23 restored by the passage of time, as felons' rights often are,
24 the state does give misdemeanants an opportunity to seek
25 pardon or expungement. Some of the largest states make

1 expungement available as of right to misdemeanants who have a
2 clean record for a specified time. California, for example,
3 has such a program," citing California Penal Code
4 Section 1203.4a. That, by the way, is a misstatement of
5 California law, but it's a Seventh Circuit case so I'll
6 excuse that. "See also Robert A. Mikos, Enforcing State Law
7 in Congress's Shadow, a Cornell Law Review article, finding
8 that expungement increased following the enactment of
9 922(g)(9). This means that Section 922(g)(9) in its normal
10 application does not create a perpetual and unjustified
11 disqualification for a person who no longer is apt to attack
12 other members of the household."

13 And then the quote you gave me from Smith is as
14 follows: "It is clear from the federal law that the majority
15 of domestic violence offenders will not regain their firearms
16 possession right. However, there are procedures for the
17 restoration of the right. Namely, 18 U.S.C. Section
18 921(a)(33)(B)(ii) excepts from the firearms ban individuals
19 whose domestic violence convictions have been expunged, set
20 aside, pardoned, or whose civil rights have been otherwise
21 restored. There is, therefore, a mechanism whereby domestic
22 violence misdemeanants can regain their right to lawfully
23 keep and bear arms. It is up to state legislatures to
24 constrict or expand the ease with which convicted
25 misdemeanants may apply for and receive relief under these

1 measures."

2 And I wrote next to that quote: What if there is no
3 mechanism as there is in this case? What if I have
4 plaintiffs who have absolutely no mechanism whereby they can
5 regain their right to lawfully keep and bear arms under any
6 state statute? I have plaintiffs who can't get their -- at
7 least can't get a finding that their conviction has been
8 expunged, can't get a finding that it's been set aside, they
9 can't get a pardon. 1203.4a now is the same as 1203.4. That
10 doesn't give them the relief.

11 So on the one hand, the government says a lifetime ban
12 may be the result of this statute, and we recognize that.
13 But there's a safety valve in the statute. And that is
14 there's at least some due process that can be found in each
15 state. Well, what if I have a state -- I think that's what
16 makes this case somewhat unique. What do I do if I have a
17 state like California that doesn't have anything available to
18 these plaintiffs that would satisfy that statute? Why should
19 I still apply the statute against these specific plaintiffs?
20 That's the hardest issue I'm having to deal with, I think, in
21 this case.

22 MR. OLSEN: I will answer that question, but let me
23 just focus my argument first on some minor points. I'm
24 reading the second amended complaint again as you're talking,
25 and I don't actually see a reference in there as to whether

1 or not they were granted probation or not. And plaintiffs
2 don't explain, and I think the opportunity was there in
3 response to the government's motion to dismiss, why they
4 couldn't apply for relief under 1203.4a.

5 THE COURT: I sort of slid over into the summary
6 judgment motion. Again, keep in mind this is a motion to
7 dismiss so I have to take facts as true. And I think,
8 ultimately, I don't see anything in the declarations and in
9 the records that I looked at quickly that any of these guys
10 got anything other than probation. So assume that's true,
11 that that argument they have could have applied under --
12 because I thought about that, but I think they clearly were
13 foreclosed from applying under 1203.4a. And now they clearly
14 are because they changed the law again, recognizing it made
15 no sense at all that someone who ends up going to jail for a
16 misdemeanor can apply under 1203.4a, but if you get
17 probation, you can't apply. Finally someone in the
18 California Legislature figured that out, and now the statutes
19 are the same. So assume that argument, you know, you can't
20 go down that path.

21 MR. OLSEN: Just briefly on that point though. My
22 understanding of what the California Legislature did in
23 amending 1203.4a was to say oh, well, just like 1203.4, this
24 doesn't mean that you can possess a firearm within ten years
25 of your conviction without running afoul of --

1 THE COURT: What they did is instead of distinguishing
2 between someone who got jail time and someone who got put on
3 probation, it's now the same.

4 MR. OLSEN: But what they didn't change is the
5 requirement under 1203.4a that you have to have lived an
6 honest and upright life and conform to and obey the laws of
7 the land. That language I think is different than 1203.4.
8 And I don't think the California Legislature amended that
9 portion of it. So there is -- I don't pretend to know why
10 the California Legislature drew that distinction between
11 1203.4 and 1203.4a, but there do seem to be some additional
12 requirements that someone must satisfy. And also there's
13 that language in 1203.4 which says just because you obtain
14 relief under this provision doesn't mean that you still have
15 to answer questions honestly on applications that ask you if
16 you've been convicted of crimes. You know, this conviction
17 can still be used --

18 THE COURT: I understand.

19 MR. OLSEN: So there's some reason to believe that
20 that doesn't constitute an expungement, whereas 1203.4a would
21 constitute an expungement because that language about not
22 being able to use a conviction for future purposes is not in
23 1203.4a.

24 THE COURT: Let me put it differently because I like
25 to sort of get away from legalese.

1 MR. OLSEN: Right.

2 THE COURT: So I'm Richard Enos, and I'm sitting
3 across the table from you, and I, in effect, say what else
4 can I do, Mr. Olsen? I've done everything I can under state
5 law, and you keep telling me that under federal law, I'm not
6 rehabilitated enough. I haven't had any civil right
7 restored. I don't have anything left I can do. And how is
8 that a fair application, a constitutional application of this
9 law to me? That's the question from a practical point of
10 view.

11 MR. OLSEN: Right.

12 THE COURT: What's the answer?

13 MR. OLSEN: Well, assuming there is no safety valve
14 practically for any of these plaintiffs --

15 THE COURT: There's no due process. Let's use that
16 word.

17 MR. OLSEN: Well, let me say this. The case that
18 plaintiffs cited for this due process, that case is easily
19 distinguished because here the due process was the criminal
20 proceeding that occurred that led to the conviction. In the
21 case that plaintiffs cited, this was a mental health
22 commitment that, you know, whether it was ex parte or there
23 weren't the procedures that we normally understand as due
24 process. In order to deprive somebody of the right to
25 possess a firearm for life, the court wanted to make sure

1 that really this person has been determined to be mentally
2 ill pursuant to some process where they get due process.

3 THE COURT: So now someone goes into the superior
4 court tomorrow and enters a misdemeanor plea to -- nolo plea
5 to a 273.5. Your view is that superior court judge
6 absolutely has to inform that person that if you enter a nolo
7 plea, there is a lifetime ban on your right to possess or
8 bear arms. Would you agree with that statement?

9 MR. OLSEN: No.

10 THE COURT: Why not?

11 MR. OLSEN: Well, I think the distinction I was trying
12 -- first of all, I don't think --

13 THE COURT: Because I don't see any process by which
14 someone who enters a nolo plea to a misdemeanor crime of
15 273.5, domestic violence, can ever get their right to bear
16 arms back.

17 MR. OLSEN: Let me just focus on the primary point
18 you're making and then later, if you still want to hear from
19 me, I can talk about the due process portion. But assuming
20 there's no safety valve for these plaintiffs, the Ninth
21 Circuit has already said in the context of 922(g)(1), which
22 is the felon in possession statute, the analogous statute
23 to --

24 THE COURT: It's not analogous. I know you want me to
25 think (g)(1) is similar to (g)(9), and it's not.

1 MR. OLSEN: And I can explain why the government
2 believes that and why a lot of courts across the country say
3 there's even a stronger basis in a 922(g)(9) case.

4 THE COURT: Go ahead.

5 MR. OLSEN: The Ninth Circuit has already held
6 bluntly, in a cursory fashion, that felons are not protected
7 by the Second Amendment when it comes to gun possession.
8 It's directly from the language of Vongxay. But in this
9 case, there's even a stronger reason to say that with regard
10 to someone who's been convicted of a misdemeanor crime of
11 domestic violence because, by definition, they've been
12 convicted of a violent crime.

13 Under felons, you could have a felon who was convicted
14 of tax evasion. So a completely nonviolent criminal, the
15 Ninth Circuit has said you're disqualified -- is another term
16 the Ninth Circuit used -- from protection under the Second
17 Amendment. So if felons across the board are not protected
18 by Heller, then, by implication, someone who's been convicted
19 of a violent crime, domestic violence, is also not protected
20 by the Second Amendment.

21 And there are cases which say -- the Eleventh Circuit
22 has said that, the Tenth Circuit has said that, and a number
23 of district courts have said that, that for the same reasons
24 that the court articulated for saying that these presumably
25 lawful long-standing prohibitions that the Supreme Court

1 referred to in Heller, for the reasons that courts have said
2 that felons are not protected by the Second Amendment,
3 there's even a stronger reason for saying that persons
4 convicted of misdemeanor crimes of domestic violence should
5 not be protected.

6 So assuming there's no safety valve, as tough medicine
7 as that is for the plaintiffs to hear, the Ninth Circuit has
8 already said you're out of luck if you're a felon in
9 possession. And there are courts that say, by implication,
10 the same should apply to persons convicted of misdemeanor
11 crimes of domestic violence because they're, by definition,
12 violent offenders.

13 MR. KILMER: Now who's rewriting the statute, your
14 Honor? If the federal government's position is a misdemeanor
15 crime of domestic violence should be treated exactly like a
16 felony, the Lautenberg amendment could have just as easily
17 said that. It doesn't. It says that there is a state law
18 restoration procedure if your rights have been taken away.
19 If your rights have been restored under state law, you no
20 longer fall under this prohibition.

21 It's also quite wrong to say that felons are forever
22 barred. Felons are not forever barred. There's a procedure
23 under 925 for restoring a felon's rights. And but for the
24 fact that Congress doesn't fund the program, a felon could
25 even have their rights restored. And this is all prior to

1 Heller. This is all prior to McDonald.

2 So the government recognizes, the Legislature has
3 always recognized, both the State of California and the
4 federal government, that rehabilitation and restoration of
5 rights is part of the criminal law process. They may erect a
6 very high bar like California does and say it's ten years,
7 pal. If you hurt somebody in your family, if you strike your
8 wife or strike your child or strike your spouse, you're going
9 to lose important civil rights for ten years. No way around
10 it. And we're not here arguing that that's not legitimate.
11 What we're saying is that if the state restores the rights,
12 the federal government has to recognize that.

13 THE COURT: And why don't they? Particularly in a
14 case where there's absolutely no avenue available to these
15 plaintiffs at all for relief under the statute. There isn't.
16 I'm paraphrasing, but, in effect, you're saying that's tough.
17 That was contemplated by the plain language of this statute.
18 And that's why I have problems accepting that argument when I
19 read these cases that you cite to me that keep talking about,
20 well, no, it's okay to include this in the statute so long as
21 there is some mechanism, as this case Smith says, as long as
22 there's a mechanism where domestic violence misdemeanants can
23 regain their right to lawfully keep and bear arms.

24 MR. OLSEN: My response to that is twofold. Yes, the
25 government is saying tough, not just willy-nilly saying it's

1 tough, but because the Ninth Circuit has said that with
2 respect to felons in possession. That without even looking
3 to these avenues that a defendant may have for restoring
4 civil rights, the Ninth Circuit has said, and the quote is,
5 "the right established by Heller does not apply to felons."
6 And that's at Vongxay, 594 F.3d at 1119. So it's twofold.
7 One, it's tough. But two, I do read Smith, and there's
8 another case cited in the government's brief called Tooley.
9 The way I read their analysis is that, first of all, it's not
10 necessarily a lifetime ban because of these procedures that
11 you can follow. But then, secondly, assuming that those
12 avenues are not available to you, it still satisfies
13 intermediate scrutiny because, although the statute
14 potentially could have been more narrowly drafted, for
15 example, by putting a time limitation on your prohibition on
16 possessing firearms, that Congress didn't have to do that
17 because although you may narrow the sweep, you would lessen
18 the effectiveness of a statute, and that there's plenty of
19 empirical evidence which establishes that persons convicted
20 of misdemeanor crimes of domestic violence are recidivists.

21 THE COURT: So you want me to fashion an order that
22 says under the facts of this specific case, the State of
23 California does not give these plaintiffs any opportunity
24 whatsoever to seek expungement, pardon, dismissal, or the
restoration of civil rights for the rest of their lives. And

1 even under those specific set of facts, which are undisputed,
2 the law as applied is still constitutional under the Second
3 Amendment. That's the conclusion you want me to reach.

4 MR. OLSEN: Yes.

5 THE COURT: And finish the rest of that paragraph.

6 Why?

7 MR. OLSEN: My only quibble there is I'm not sure
8 whether it's accurately called an as-applied challenge
9 because the statute hasn't been applied to them. I think
10 it's probably more appropriately framed in terms of an
11 overbreadth challenge. And there's some references in Smith
12 and the Williams case from the Seventh Circuit which talk
13 about arguments that aren't pending before the court but
14 could potentially be brought along the lines of what
15 plaintiffs are trying to argue now, and they're framed in
16 terms of an overbreadth challenge which I think is a facial
17 challenge.

18 THE COURT: You keep saying the statute isn't being
19 applied to them, and I'm missing that. Why isn't the statute
20 being applied to them?

21 MR. OLSEN: Well, they haven't been convicted under
22 this statute, which is the way 99 percent of these
23 constitutional challenges that you see is that someone --

24 THE COURT: Oh, I see. They didn't go out and get
25 arrested.

1 MR. OLSEN: Correct.

2 THE COURT: Okay. Interesting. Okay.

3 MR. OLSEN: Assuming that the argument is more
4 properly brought as an overbreadth challenge, which the
5 plaintiffs have standing to bring, yes, the government would
6 ask that you enter that order assuming for purposes of
7 argument that none of these safety valves are available, the
8 statute is still constitutional.

9 THE COURT: Under your analysis, that because under
10 the law that applies to felons, in effect, Congress intended
11 the same rationality be applied to, and I understand it's
12 because of the specific crime of domestic violence, that they
13 should be treated similarly.

14 MR. OLSEN: Just like felons in possession,
15 individuals who have been convicted of crimes of domestic
16 violence are also in that category that the Supreme Court
17 referred to as presumptively lawful. Even if you have to go
18 on and apply intermediate scrutiny, that even if it is a
19 lifetime ban, the lifetime ban on persons who have been
20 convicted of violent crimes like that, it substantially
21 promotes a legitimate government interest. You know, it
22 could potentially be more narrowly drafted, but Congress
23 doesn't have to do that to satisfy intermediate scrutiny, and
24 it satisfies intermediate scrutiny.

25 THE COURT: Mr. Kilmer, I'll give you the final word.

1 MR. KILMER: It's premature to assume that the Ninth
2 Circuit or any higher court is going to apply intermediate
3 scrutiny to Second Amendment rights. The Supreme Court in
4 Heller, and I believe there was some language in McDonald,
5 said that rational basis clearly doesn't apply. An
6 interest-balancing test that Justice Breyer proposed clearly
7 doesn't apply. By my reading, that means intermediate and
8 rational basis are out the window, and we have to follow
9 something along the lines of the Seventh Circuit case, Ezell
10 vs. City of Chicago, that says something close to almost
11 strict. But one of the other things that we had is Heller
12 and McDonald --

13 THE COURT: Were you practicing your argument for the
14 Nordyke case just now?

15 MR. KILMER: I might be, your Honor. I might be.
16 However, one of the things -- I'll admit to being somewhat
17 hardheaded here.

18 THE COURT: That's your job.

19 MR. KILMER: I have been arguing for strict scrutiny
20 in the Nordyke case and in other cases that I'm prosecuting.
21 But, you know, it dawned on me when I read the U.S. Supreme
22 Court case that came out earlier this week, United States vs.
23 Jones, that the Supreme Court is subtly shifting towards a
24 historical categorical analysis of fundamental rights and
taking a look at what were the rights -- how were the rights

1 defined at the time the amendment was ratified or at the time
2 it was applied to the states. So we're looking at 1798 and
3 1868 for laws applied to the states, which doesn't count here
4 because this is a federal law. There were no laws forbidding
5 misdemeanants or misdemeanor crimes of domestic violence from
6 having guns when the Second Amendment was ratified. So if we
7 go down that path of scrutiny analysis, then the government
8 just flat loses. So it's premature at this point for the
9 Court to engage in an exercise of trying to second-guess the
10 Ninth Circuit on whether they're going to apply immediate
11 scrutiny or undue burden or almost strict scrutiny, which is
12 why we kind of didn't hit our Second Amendment argument all
13 that heavy in our motion for summary judgment. We just kind
14 of laid the argument out there and said well, it's the
15 government's burden. They've got to come up with evidence.
16 One of the things I would note is they didn't produce any
17 admissible evidence in their opposition to the summary
18 judgment motion.

19 THE COURT: It's an interesting question that reminded
20 me of something to ask Mr. Olsen. And that is what you
21 brought me is a motion to dismiss, and so I'm really
22 precluded from sort of deciding the intermediate scrutiny
23 issue on a motion to dismiss, aren't I?

24 MR. OLSEN: I think that's right, your Honor.

25 THE COURT: I have to wait for the motion for summary

1 judgment.

2 MR. OLSEN: I think that's correct. Although I would
3 argue that you don't even have to reach the intermediate
4 scrutiny, because if you apply that Ninth Circuit decision in
5 Vongxay, Vongxay says we don't need to apply any
6 constitutional scrutiny to the statute.

7 THE COURT: Right.

8 MR. OLSEN: So I think if you issued an opinion along
9 the lines of Vongxay and extended Vongxay to 922(g)(9), I
10 think that would be appropriate for dismissal under 12(b)(6).

11 THE COURT: Okay. I understand your point.

12 Mr. Kilmer, as I said, I'll give you the final word.
13 I'm going to obviously take it under submission.

14 MR. KILMER: Yes, your Honor. I think the Court
15 understands the issues as we've briefed them. You're going
16 to disallow my claim of our defective waiver theory.

17 THE COURT: Right.

18 MR. KILMER: We have the other theory of the
19 restoration of rights by operation of law which includes all
20 the plaintiffs.

21 THE COURT: Right.

22 MR. KILMER: Did the Court want to address the one
23 singular plaintiff, Mr. Enos, who actually went to a superior
24 court judge under 1203 --

25 THE COURT: 12021(c)(3).

1 MR. KILMER: -- 12021(c)(3) and had a judge say yeah,
2 your rights are restored. The federal government refuses to
3 recognize that as well. By the way, that due process right
4 is no longer available to anybody in the state because
5 everybody convicted after 1993 is apprised or at least on
6 notice that their California conviction will result in the
7 loss of their guns.

8 THE COURT: Mr. Olsen, do you want to respond to the
9 12021(c)(3)?

10 MR. OLSEN: Yeah. For the same reasons that the
11 plaintiffs' arguments lack merit under, what is it, 12021(a),
12 they fail for the same reasons. I mean it's not --
13 regardless of whether you got your right to bear arms
14 restored by operation of law under (a)(1) or by a superior
15 court judge under (c)(3), it doesn't matter, because you
16 haven't had your civil rights restored within the meaning of
17 the Lautenberg amendment. So they're the same arguments.

18 THE COURT: Okay.

19 MR. OLSEN: I have nothing further.

20 THE COURT: I understand your argument.

21 MR. KILMER: I have nothing further to add, your
22 Honor.

23 THE COURT: Thank you both for another interesting
24 argument. We'll come back to reschedule that summary
25 judgment motion. We're still two months away, and I think

1 even given my caseload, I'll be able to get an opinion out
2 hopefully fairly soon.

3 When were you thinking about wanting to reschedule the
4 summary judgment hearing?

5 MR. KILMER: Your Honor, the order telling me that I
6 had to be prepared to argue the case en banc said basically
7 the week of the 19th.

8 THE COURT: Okay.

9 MR. KILMER: They were somewhat vague on that.

10 THE COURT: I have to tell you honestly, I'm not sure
11 I'm going to need argument on the summary judgment motion.
12 And obviously I can decide motions without a hearing. And I
13 say that only because of the arguments today and the first
14 argument that we had. So what I'm going to do is vacate the
15 hearing date on the summary judgment motion. It's been fully
16 briefed.

17 MR. KILMER: All right.

18 THE COURT: Mr. Olsen, I do want you to respond,
19 though, so I have something on the record to the objections.
20 I don't know if you did yet or not. You submitted a number
21 of documents that Mr. Kilmer objected to on evidentiary
22 grounds. And just so the record's complete, make sure you
23 respond.

24 MR. OLSEN: I'd be happy to file something written
25 along those lines.

1 THE COURT: Right.

2 MR. OLSEN: I'm not aware of any requirement that when
3 the government submits empirical evidence in the form of
4 studies --

5 THE COURT: How did you ask me to take notice of that?
6 Did you ask me to take judicial notice?

7 MR. OLSEN: I have not, and I probably should do that.
8 I just attached them to an appendix.

9 THE COURT: I just want you to make sure there's a
10 response to the objections.

11 MR. OLSEN: I will do that.

12 THE COURT: So I'm going to vacate the hearing date
13 itself. And if I need a hearing, we'll contact both of you
14 and bring you back for a hearing. If not, I'll just decide
15 it on the papers. Okay?

16 MR. KILMER: And, your Honor, just to keep the record
17 clear, do we already have a stipulation --

18 THE COURT: You should put it in writing and submit
19 it.

20 MR. KILMER: Okay. But I'm going to hold off filing
21 another amended complaint at this point in order to keep the
22 record clear because you're going to make a ruling.

23 THE COURT: Right. But make sure that stipulation
24 with respect to the naming of the proper defendant, the two
25 of you draft something and get it to me so the record is

1 complete.

2 MR. KILMER: I'll take the lead on that.

3 THE COURT: Thank you both.

4 MR. OLSEN: Thank you, your Honor.

5 THE COURT: All right.

6 (Proceedings concluded at 3:44 p.m.)

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1 I certify that the foregoing is a correct transcript
2 from the record of proceedings in the above-entitled matter.
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4

5 /s/ Kelly O'Halloran

6 KELLY O'HALLORAN, CSR #6660
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U.S. District Court
Eastern District of California – Live System (Sacramento)
CIVIL DOCKET FOR CASE #: 2:10-cv-02911-JAM-EFB

Enos et al v. Holder et al
Assigned to: Judge John A. Mendez
Referred to: Magistrate Judge Edmund F. Brennan
Case in other court: 9th Circuit, 12-15498
Cause: 42:1983 Civil Rights Act

Date Filed: 10/29/2010
Date Terminated: 02/28/2012
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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TERMINATED: 05/05/2011

Plaintiff

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V.

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| Date Filed | # | Docket Text |
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| 10/29/2010 | <u>1</u> | COMPLAINT against All Defendants by Edward Erikson, Jeff Bastasini, Walter Groves, Manuel Monteiro, William Edwards, Jeff Loughran, Richard Enos, Vernon Newman, Louie Mercado. (Attachments: # <u>1</u> Civil Cover Sheet)(Kilmer, Donald) (Entered: 10/29/2010) |
| 10/29/2010 | | RECEIPT number #CAE200030645 \$350.00 fbo Richard Enos by Donald E Kilmer Jr on 10/29/2010. (Kaminski, H) (Entered: 10/29/2010) |
| 10/29/2010 | <u>3</u> | SUMMONS ISSUED as to *Eric Holder, Robert Mueller, III* with answer to complaint due within *60* days. Attorney *Donald E. J. Kilmer, Jr.* *Law Offices Of Donald Kilmer, APC* *1645 Willow Street, Suite 150* *San Jose, CA 95125*. (Kaminski, H) (Entered: 10/29/2010) |
| 10/29/2010 | <u>4</u> | CIVIL NEW CASE DOCUMENTS ISSUED; (Attachments: # <u>1</u> Consent Form, # <u>2</u> Order re Page Limits) (Kaminski, H) (Entered: 10/29/2010) |
| 10/29/2010 | <u>5</u> | VDRP ISSUED; (Kaminski, H). (Entered: 10/29/2010) |
| 12/22/2010 | <u>6</u> | SUMMONS RETURNED EXECUTED by Edward Erikson, Jeff Bastasini, Walter Groves, Manuel Monteiro, William Edwards, Jeff Loughran, Richard Enos, Vernon Newman, Louie Mercado. Eric Holder served on 11/24/2010, answer due 1/24/2011; Robert Mueller, III served on 11/22/2010, answer due 1/21/2011. (Attachments: # <u>1</u> Declaration, # <u>2</u> Exhibit, # <u>3</u> Declaration, # <u>4</u> Exhibit)(Kilmer, Donald) (Entered: 12/22/2010) |

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| 01/10/2011 | <u>7</u> | STIPULATION and PROPOSED ORDER re Case Management by plaintiffs. (Kilmer, Donald) Modified on 1/12/2011 (Marciel, M). (Entered: 01/10/2011) |
| 01/10/2011 | <u>8</u> | FIRST AMENDED COMPLAINT against Eric Holder, Robert Mueller, III by plaintiffs. (Kilmer, Donald) Modified on 1/12/2011 (Marciel, M). (Entered: 01/10/2011) |
| 01/11/2011 | <u>9</u> | STIPULATION and ORDER signed by Judge John A. Mendez on 01/11/11 ORDERING that Attorney Edward A Olsen, GOVT is authorized to represent dfts Eric Holder and Robert Mueller, III; the dfts have been properly served, the dfts make a special appearance and agree to accept all future service via CM/ECF; plfs anticipate filing an Amended Complaint by 02/20/11; dfts agree to respond to the Amended Complaint by 02/25/11. (Benson, A.) (Entered: 01/11/2011) |
| 02/24/2011 | <u>10</u> | STIPULATION to extend deadline for responsive pleading by defendants. (Olsen, Edward) Modified on 2/25/2011 (Marciel, M). (Entered: 02/24/2011) |
| 03/04/2011 | <u>11</u> | MOTION to DISMISS by Eric Holder, Robert Mueller, III. Motion Hearing set for 5/4/2011 at 09:30 AM in Courtroom 6 (JAM) before Judge John A. Mendez. (Attachments: # <u>1</u> Points and Authorities)(Olsen, Edward) (Entered: 03/04/2011) |
| 04/20/2011 | <u>12</u> | OPPOSITION by Jeff Bastasini, William Edwards, Richard Enos, Edward Erikson, Walter Groves, Jeff Loughran, Louie Mercado, Manuel Monteiro, Vernon Newman to <u>11</u> MOTION to DISMISS. (Kilmer, Donald) (Entered: 04/20/2011) |
| 04/21/2011 | <u>13</u> | REQUEST for JUDICIAL NOTICE by Jeff Bastasini, William Edwards, Richard Enos, Edward Erikson, Walter Groves, Jeff Loughran, Louie Mercado, Manuel Monteiro, Vernon Newman in re <u>12</u> Opposition to Motion. (Kilmer, Donald) (Entered: 04/21/2011) |
| 04/21/2011 | <u>14</u> | NOTICE of ERRATA and DECLARATION of Donald Kilmer in OPPOSITION TO <u>11</u> MOTION to DISMISS. (Kilmer, Donald) Modified on 4/28/2011 (Zignago, K.). (Entered: 04/21/2011) |
| 04/27/2011 | <u>15</u> | REPLY by Eric Holder, Robert Mueller, III to RESPONSE to <u>11</u> Motion to Dismiss. (Olsen, Edward) (Entered: 04/27/2011) |
| 04/27/2011 | <u>16</u> | NOTICE of Filing of Corrected Reply by Eric Holder, Robert Mueller, III re <u>15</u> Reply to Response to Motion. (Attachments: # <u>1</u> Corrected Reply Brief)(Olsen, Edward) (Entered: 04/27/2011) |
| 05/03/2011 | <u>17</u> | NOTICE of Additional Authority by Eric Holder, Robert Mueller, III re <u>11</u> MOTION to DISMISS. (Attachments: # <u>1</u> Exhibit A)(Olsen, Edward) (Entered: 05/03/2011) |
| 05/03/2011 | <u>18</u> | NOTICE (Supplemental) of Additional Authority by Eric Holder, Robert Mueller, III re <u>11</u> MOTION to DISMISS. (Attachments: # <u>1</u> Exhibit A)(Olsen, Edward) (Entered: 05/03/2011) |
| 05/04/2011 | <u>19</u> | MINUTES (Text Only) for proceedings held before Judge John A. Mendez: MOTION HEARING held on 5/4/2011 re <u>11</u> MOTION to DISMISS filed by Robert Mueller, III, Eric Holder, MOTIONS SUBMITTED: Further briefing, limited to 5 pages, to be filed by 5/11/11 and 5/18/11. Order to be prepared by Court in due course. Plaintiffs Counsel D. Kilmer present. Defendants Counsel E. Olsen present. Court Reporter: K. O'Halloran. (Vine, H) (Entered: 05/04/2011) |
| 05/05/2011 | <u>20</u> | MINUTE ORDER: Pursuant to the Courts ruling during oral argument on 5/4/11, Plaintiffs William Edwards and Jeff Loughran are dismissed from this case, due to improper joinder and venue. Dismissal is without prejudice for re-filing in the appropriate venue. IT IS SO ORDERED. (TEXT ENTRY ONLY) (Vine, H) (Entered: 05/05/2011) |
| 05/06/2011 | <u>21</u> | SUPPLEMENTAL BRIEF by plts re <u>17</u> <u>18</u> Supplemental Authority submitted by dfts. (Kilmer, Donald) Modified on 5/9/2011 (Duong, D). (Entered: 05/06/2011) |
| 05/18/2011 | <u>22</u> | BRIEF by Eric Holder, Robert Mueller, III. (Olsen, Edward) (Entered: 05/18/2011) |
| 06/17/2011 | <u>23</u> | NOTICE of Supplemental Authority by plaintiffs. (Kilmer, Donald) Modified on 6/20/2011 (Marciel, M). (Entered: 06/17/2011) |

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| 07/08/2011 | <u>24</u> | ORDER signed by Judge John A. Mendez on 7/7/11 GRANTING IN PART AND DENYING IN PART <u>11</u> Motion to Dismiss. Defendants' motion to dismiss the FAC is GRANTED in part and DENIED in part. Bastasini's, Mercado's, Groves', Monteiro's, Erickson's, and Newman's declaratory relief and constitutional claims are DISMISSED, with leave to amend. Enos' First Amendment, Tenth Amendment and Fifth Amendment claims are DISMISSED, with prejudice. The motion to dismiss is DENIED as to dismissal of Enos' declaratory relief and Second Amendment claims. Plaintiffs must file a Second Amended Complaint within twenty (20) days of the date of this order. (Meuleman, A) (Entered: 07/08/2011) |
| 07/20/2011 | <u>25</u> | STIPULATION and PROPOSED ORDER for Extend Time to File 2nd Amended Complaint by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. (Kilmer, Donald) (Entered: 07/20/2011) |
| 07/22/2011 | <u>26</u> | STIPULATION and ORDER signed by Judge John A. Mendez on 7/20/11 ORDERING that the plaintiffs shall file and serve a second amended complaint on or before 8/29/11. (Donati, J) (Entered: 07/22/2011) |
| 08/29/2011 | <u>27</u> | SECOND AMENDED COMPLAINT against all Defendants by Plaintiffs.(Kilmer, Donald) Modified on 8/31/2011 (Zignago, K.). (Entered: 08/29/2011) |
| 09/06/2011 | <u>28</u> | STIPULATION and PROPOSED ORDER for To Extend Deadline for Filing a Responsive Pleading to Plaintiff's Second Amended Complaint re <u>27</u> Amended Complaint by Eric Holder, Robert Mueller, III. (Olsen, Edward) (Entered: 09/06/2011) |
| 09/07/2011 | <u>29</u> | STIPULATION and ORDER <u>28</u> signed by Judge John A. Mendez on 9/6/11, ORDERING that the deadline for the filing of a responsive pleading to plaintiffs' second amended complaint is EXTENDED to 9/26/11. (Kastilahn, A) (Entered: 09/07/2011) |
| 09/13/2011 | <u>30</u> | SECOND STIPULATION and [PROPOSED] ORDER to Extend Deadline for Filing a Responsive Pleading to Plaintiffs' Second Amended Complaint by Eric Holder, Robert Mueller, III. (Olsen, Edward) Modified on 9/14/2011 (Mena-Sanchez, L). (Entered: 09/13/2011) |
| 09/14/2011 | <u>31</u> | STIPULATION and ORDER signed by Judge John A. Mendez on 9/13/11 ORDERING the deadline for the filing of a responsive pleading to plaintiffs' Second Amended Complaint extended from September 26, 2011, to October 3, 2011. (Becknal, R) (Entered: 09/14/2011) |
| 10/03/2011 | <u>32</u> | MOTION to DISMISS by Eric Holder, Robert Mueller, III. Motion Hearing set for 11/16/2011 at 09:30 AM in Courtroom 6 (JAM) before Judge John A. Mendez. (Attachments: # <u>1</u> Points and Authorities)(Olsen, Edward) (Entered: 10/03/2011) |
| 10/13/2011 | <u>33</u> | STIPULATION and PROPOSED ORDER for Continuance of Hearing by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. (Kilmer, Donald) (Entered: 10/13/2011) |
| 10/18/2011 | <u>34</u> | STIPULATION and PROPOSED ORDER for Continuance by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. (Kilmer, Donald) (Entered: 10/18/2011) |
| 10/19/2011 | <u>35</u> | STIPULATION and ORDER signed by Judge John A. Mendez on 10/18/11 ORDERING hearing on <u>32</u> MOTION to DISMISS reset for 1/25/2012 at 09:30 AM in Courtroom 6 (JAM) before Judge John A. Mendez, Responses due by 1/11/2012, Replies due by 1/18/2012. Plaintiffs' FRCP 56 cross-motion shall be heard on 1/25/12 at 9:30 a.m. Plts' motion and supporting documents shall be filed on or before 12/14/11; def's opposition due 1/11/12; pltfs' reply due 1/18/12. (Meuleman, A) (Entered: 10/19/2011) |
| 12/06/2011 | <u>36</u> | NOTICE of Additional Authority by Eric Holder, Robert Mueller, III. (Olsen, Edward) (Entered: 12/06/2011) |
| 12/12/2011 | <u>37</u> | STIPULATION and PROPOSED ORDER for Extension of Time to File FRCP 56 Motion by plaintiffs. (Kilmer, Donald) Modified on 12/13/2011 (Duong, D). (Entered: 12/12/2011) |

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| 12/13/2011 | <u>38</u> | STIPULATION and ORDER signed by Judge John A. Mendez on 12/13/2011 ORDERING that the parties hereby stipulate that Plaintiffs have good cause to extend the due date for filing/serving their moving papers on their FRCP 56 Motion from 12/14/2011 to 12/19/2011, that neither party is prejudiced by this extension, and that all other due dates currently set forth in this Court <u>35</u> Order shall remain as set. (Zignago, K.) (Entered: 12/13/2011) |
| 12/19/2011 | <u>39</u> | MOTION for SUMMARY JUDGMENT by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. Motion Hearing set for 1/25/2012 at 09:30 AM in Courtroom 6 (JAM) before Judge John A. Mendez. (Attachments: # <u>1</u> Exhibit ATF 3310.3)(Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>40</u> | STATEMENT of Undisputed Facts by Plaintiffs Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman re <u>39</u> MOTION for SUMMARY JUDGMENT. (Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>41</u> | DECLARATION of BASTASINI in SUPPORT OF <u>39</u> MOTION for SUMMARY JUDGMENT. (Attachments: # <u>1</u> Exhibit)(Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>42</u> | DECLARATION of ENOS in SUPPORT OF <u>39</u> MOTION for SUMMARY JUDGMENT. (Attachments: # <u>1</u> Exhibit)(Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>43</u> | DECLARATION of ERIKSON in SUPPORT OF <u>39</u> MOTION for SUMMARY JUDGMENT. (Attachments: # <u>1</u> Exhibit)(Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>44</u> | DECLARATION of GROVES in SUPPORT OF <u>39</u> MOTION for SUMMARY JUDGMENT. (Attachments: # <u>1</u> Exhibit)(Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>45</u> | DECLARATION of MERCADO in SUPPORT OF <u>39</u> MOTION for SUMMARY JUDGMENT. (Attachments: # <u>1</u> Exhibit)(Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>46</u> | DECLARATION of MONTEIRO in SUPPORT OF <u>39</u> MOTION for SUMMARY JUDGMENT. (Attachments: # <u>1</u> Exhibit)(Kilmer, Donald) (Entered: 12/19/2011) |
| 12/19/2011 | <u>47</u> | DECLARATION of NEWMAN in SUPPORT OF <u>39</u> MOTION for SUMMARY JUDGMENT. (Attachments: # <u>1</u> Exhibit)(Kilmer, Donald) (Entered: 12/19/2011) |
| 01/04/2012 | <u>48</u> | MINUTE ORDER: The parties are hereby notified that the time for the hearing on the motion(s) now set for January 25, 2012 is reset to 1:30 p.m. (TEXT ENTRY ONLY)(Vine, H) (Entered: 01/04/2012) |
| 01/11/2012 | <u>49</u> | OPPOSITION to <u>39</u> Motion for Summary Judgment by Eric Holder, Robert Mueller, III. (Attachments: # <u>1</u> Response to Plaintiffs' Statement of Undisputed Facts, # <u>2</u> Appendix of Articles Cited In Defendants' Opposition, # <u>3</u> Exhibit A, # <u>4</u> Exhibit B, # <u>5</u> Exhibit C, # <u>6</u> Exhibit D, # <u>7</u> Exhibit E, # <u>8</u> Exhibit F, # <u>9</u> Exhibit G) (Olsen, Edward) Modified on 1/12/2012 (Michel, G). (Entered: 01/11/2012) |
| 01/11/2012 | <u>50</u> | OPPOSITION to <u>32</u> Motion to Dismiss by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. (Kilmer, Donald) Modified on 1/12/2012 (Michel, G). (Entered: 01/11/2012) |
| 01/18/2012 | <u>51</u> | REPLY by Eric Holder, Robert Mueller, III to RESPONSE to <u>32</u> MOTION to DISMISS. (Olsen, Edward) Modified on 1/30/2012 (Zignago, K.). (Entered: 01/18/2012) |
| 01/18/2012 | <u>52</u> | OBJECTIONS by Plaintiffs Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman to <u>49</u> Opposition to Motion,. (Kilmer, Donald) (Entered: 01/18/2012) |
| 01/18/2012 | <u>53</u> | REQUEST for JUDICIAL NOTICE by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. (Kilmer, Donald) (Entered: 01/18/2012) |
| 01/18/2012 | <u>54</u> | REQUEST for JUDICIAL NOTICE by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. (Kilmer, Donald) (Entered: 01/18/2012) |

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| 01/18/2012 | <u>55</u> | REPLY by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman to RESPONSE to <u>39</u> MOTION for SUMMARY JUDGMENT. (Kilmer, Donald) Modified on 1/30/2012 (Zignago, K.). (Entered: 01/18/2012) |
| 01/19/2012 | <u>56</u> | MINUTE ORDER: The parties are advised that the hearing on plaintiff's motion for summary judgment <u>39</u> is ordered reset for 3/21/2012 at 09:30 AM in Courtroom 6 (JAM) before Judge John A. Mendez. The defendant's motion to dismiss <u>32</u> shall remain calendared for hearing on 1/25/12 @ 9:30 a.m. (TEXT ENTRY ONLY) (Vine, H) (Entered: 01/19/2012) |
| 01/19/2012 | <u>57</u> | CORRECTED MINUTE ORDER: The parties are advised that the hearing on plaintiff's motion for summary judgment <u>39</u> is ordered reset for 3/21/2012 at 09:30 AM in Courtroom 6 (JAM) before Judge John A. Mendez. The defendant's motion to dismiss <u>32</u> shall remain calendared for hearing on 1/25/12 @ 1:30 p.m. (TEXT ENTRY ONLY)(Vine, H) (Entered: 01/19/2012) |
| 01/25/2012 | <u>58</u> | MINUTES (Text Only) for proceedings held before Judge John A. Mendez: MOTION HEARING held on 1/25/2012 re <u>32</u> MOTION to DISMISS filed by Robert Mueller, III, Eric Holder, MOTIONS SUBMITTED:. Plaintiffs Counsel D. Kilmer present. Defendants Counsel E. Olsen present. Court Reporter: K. O'Halloran. (Vine, H) (Entered: 01/25/2012) |
| 02/01/2012 | <u>59</u> | REQUEST for <i>Judicial Notice and Response to <u>52</u> Plaintiffs' Objections to Material Submitted by Defendants</i> , by Eric Holder, Robert Mueller, III. . (Olsen, Edward) Modified on 2/3/2012 (Kastilahn, A). (Entered: 02/01/2012) |
| 02/01/2012 | <u>60</u> | STIPULATION and PROPOSED ORDER for adding US as party by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman. (Kilmer, Donald) (Entered: 02/01/2012) |
| 02/02/2012 | <u>61</u> | STIPULATION and ORDER signed by Judge John A. Mendez on 2/1/2012 ORDERING that the United States be added as a defendant in this action. United States ADDED. Attorney Edward A. Olsen for United States ADDED. (Michel, G) (Entered: 02/02/2012) |
| 02/17/2012 | <u>62</u> | OBJECTIONS by Plaintiffs Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Louie Mercado, Manuel Monteiro, Vernon Newman to <u>59</u> Request. (Kilmer, Donald) (Entered: 02/17/2012) |
| 02/28/2012 | <u>63</u> | ORDER signed by Judge John A. Mendez on 2/28/2012 GRANTING <u>32</u> Defendants' motion to dismiss, and plaintiffs' second amended complaint is DISMISSED, with prejudice; the 3/21/2012 hearing on plaintiffs motion for summary judgment <u>39</u> is VACATED. (Reader, L) (Entered: 02/28/2012) |
| 02/28/2012 | <u>64</u> | JUDGMENT dated *2/28/2012* pursuant to order signed by Judge John A. Mendez on 2/28/2012. (Reader, L) (Entered: 02/28/2012) |
| 02/29/2012 | <u>65</u> | NOTICE of APPEAL by Jeff Bastasini, Richard Enos, Edward Erikson, Walter Groves, Jeff Loughran, Louie Mercado, Manuel Monteiro, Vernon Newman. (Attachments: # <u>1</u> Notice Representation Statement, # <u>2</u> Proof of Service)(Kilmer, Donald) (Entered: 02/29/2012) |
| 03/01/2012 | | RECEIPT number #CAE200042588 \$455.00 by Donald E Kilmer Jr on 3/1/2012. (Becknal, R) (Entered: 03/01/2012) |
| 03/07/2012 | <u>68</u> | APPEAL PROCESSED to Ninth Circuit re <u>65</u> Notice of Appeal filed by Vernon Newman, Jeff Bastasini, Manuel Monteiro, Louie Mercado, Richard Enos, Jeff Loughran, Walter Groves, Edward Erikson. Filed dates for Notice of Appeal *2/29/2012*, Complaint *10/29/2012* and Appealed Order / Judgment *2/28/2012*. ***Fee Status: Paid on 3/1/2012 in the amount of \$455.00*** (Attachments: # <u>1</u> Appeal Information, # <u>2</u> Certificate of Record) (Reader, L) (Entered: 03/07/2012) |
| 03/08/2012 | <u>69</u> | USCA CASE NUMBER 12-15498 for <u>65</u> Notice of Appeal filed by Vernon Newman, Jeff Bastasini, Manuel Monteiro, Louie Mercado, Richard Enos, Jeff Loughran, Walter Groves, Edward Erikson. (Waggoner, D) (Entered: 03/08/2012) |

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| 03/15/2012 | <u>70</u> | TRANSCRIPT of Motion for Summary Judgment held on 1/25/12, before Judge John A. Mendez, filed by Court Reporter Kelly OHalloran, Phone number 916-448-2712 E-mail kohalloran@comcast.net. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may also be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 4/5/2012. Redacted Transcript Deadline set for 4/16/2012. Release of Transcript Restriction set for 6/14/2012. (O'Halloran, K) (Entered: 03/15/2012) |
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9th Circuit Case Number(s) 12-15498

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Jul 2, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

s/ Donald Kilmere

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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